UNITED STATES REPORTS

VOLUME 475

CASES ADJUDGED
IN
THE SUPREME COURT
AT
OCTOBER TERM, 1985

FEBRUARY 24 THROUGH APRIL 28, 1986

TOGETHER WITH OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

HENRY C. LIND
REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, CHIEF JUSTICE.
WILLIAM J. BRENNAN, JR., ASSOCIATE JUSTICE.
BYRON R. WHITE, ASSOCIATE JUSTICE.
THURGOOD MARSHALL, ASSOCIATE JUSTICE.
HARRY A. BLACKMUN, ASSOCIATE JUSTICE.
LEWIS F. POWELL, JR., ASSOCIATE JUSTICE.
WILLIAM H. REHNQUIST, ASSOCIATE JUSTICE.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.

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SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective *nunc pro tunc* October 1, 1981, *viz.:*

For the District of Columbia Circuit, **WARREN E. BURGER**, Chief Justice.

For the First Circuit, **WILLIAM J. BRENNAN, JR.**, Associate Justice.

For the Second Circuit, **THURGOOD MARSHALL**, Associate Justice.

For the Third Circuit, **WILLIAM J. BRENNAN, JR.**, Associate Justice.

For the Fourth Circuit, **WARREN E. BURGER**, Chief Justice.

For the Fifth Circuit, **BYRON R. WHITE**, Associate Justice.

For the Sixth Circuit, **SANDRA DAY O'CONNOR**, Associate Justice.

For the Seventh Circuit, **JOHN PAUL STEVENS**, Associate Justice.

For the Eighth Circuit, **HARRY A. BLACKMUN**, Associate Justice.

For the Ninth Circuit, **WILLIAM H. REHNQUIST**, Associate Justice.

For the Tenth Circuit, **BYRON R. WHITE**, Associate Justice.

For the Eleventh Circuit, **LEWIS F. POWELL, JR.**, Associate Justice.

October 5, 1981.

Pursuant to the provisions of Title 28, United States Code, Section 42, *it is ordered* that the Chief Justice be, and he hereby is, assigned to the Federal Circuit as Circuit Justice, effective October 1, 1982.

October 12, 1982.

(For next previous allotment, see 423 U. S., p. VI.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1985

PACIFIC GAS & ELECTRIC CO. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA

No. 84–1044. Argued October 8, 1985—Decided February 25, 1986

Appellant Pacific Gas and Electric Co. has distributed a newsletter in its monthly billing statements for many years. The newsletter has included political editorials, feature stories on matters of public interest, tips on energy conservation, and information about utility services and bills. Appellee Toward Utility Rate Normalization (TURN), in a ratemaking proceeding before appellee California Public Utilities Commission (Commission), urged the Commission to forbid appellant to use billing envelopes to distribute political editorials, on the ground that appellant's customers should not bear the expense of appellant's own political speech. The Commission decided that the envelope space that appellant had used to disseminate the newsletter was the ratepayers' property, defining this "extra space" as the space left over after including the bill and required notices. In an effort to apportion this "extra space" between appellant and its customers, the Commission permitted TURN to use the "extra space" four times a year to raise funds and to communicate with ratepayers with no limitation except to state that its messages were not those of appellant. Arguing that it had a First Amendment right not to help spread a message with which it disagrees, appellant appealed the Commission's order to the California Supreme Court, which denied discretionary review.

Held: The Commission's decision must be vacated.

Remanded.

JUSTICE POWELL, joined by THE CHIEF JUSTICE, JUSTICE BRENNAN, and JUSTICE O'CONNOR, concluded:

1. The Commission's order impermissibly burdens appellant's affirmative First Amendment rights. Pp. 9–18.

(a) The order awards access to the billing envelopes only to persons or groups, such as TURN, who disagree with appellant's views as expressed in its newsletter and who oppose appellant in Commission proceedings. Such one-sidedness impermissibly burdens appellant's expression. Appellant must contend with the fact that whenever it speaks out on a given issue, it may be forced to help disseminate hostile views. Appellant "might well conclude" that, under these circumstances, "the safe course is to avoid controversy," thereby reducing the free flow of information and ideas. *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241, 257. Pp. 10, 12–15.

(b) The order also impermissibly requires appellant to associate with speech with which appellant may disagree. Appellant may be forced either to appear to agree with TURN's views or to respond. That kind of forced response is antithetical to the free discussion that the First Amendment fosters. For corporations as for individuals, the choice to speak includes within it the choice of what not to say. *Tornillo, supra*, at 258. Pp. 10–11, 15–17.

(c) The Commission's determination that the envelopes' "extra space" belongs to the ratepayers does not correct the order's constitutional deficiency. The billing envelopes remain appellant's property. Under the order, appellant must use that property to disseminate views with which it disagrees. Pp. 17–18.

2. The order is neither a narrowly tailored means of serving a compelling state interest nor a permissible time, place, or manner regulation. Pp. 19–20.

JUSTICE MARSHALL concluded that the State, pursuant to the Commission's order, has redefined a property right in the "extra space" in appellant's billing envelopes in such a way as to achieve a result—burdening one party's speech in order to enhance another party's speech—that the First Amendment disallows. *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, distinguished. Pp. 21–26.

POWELL, J., announced the judgment of the Court and delivered an opinion, in which BURGER, C. J., and BRENNAN and O'CONNOR, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 21. MARSHALL, J., filed an opinion concurring in the judgment, *post*, p. 21. REHNQUIST, J., filed a dissenting opinion, in Part I of which WHITE and STEVENS, JJ., joined, *post*, p. 26. STEVENS, J., filed a dissenting opinion, *post*, p. 35. BLACKMUN, J., took no part in the consideration or decision of the case.

Robert L. Harris argued the cause for appellant. With him on the briefs was *Malcolm H. Furbush.*

Mark Fogelman argued the cause for appellees. With him on the brief for appellee Public Utilities Commission of California were *Janice E. Kerr* and *Hector Anninos. Jerome B. Falk, Jr., Steven L. Mayer,* and *Frederic D. Woocher* filed a brief for appellees Toward Utility Rate Normalization et al.*

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*Briefs of *amici curiae* urging reversal were filed for the American Gas Association by *George H. Lawrence, David J. Muchow, John H. Myler,* and *Carol A. Smoots;* for Bell Atlantic Telephone Companies by *Daniel A. Rezneck* and *Robert A. Levetown;* for Consolidated Edison Co. of New York, Inc., by *Joy Tannian, Peter P. Garam,* and *Bernard L. Sanoff;* for the California Chamber of Commerce by *John R. Reese;* for the Edison Electric Institute by *Robert L. Baum, Peter B. Kelsey, William L. Fang,* and *James H. Byrd;* for the Gas Distributors Information Service by *Paul A. Lenzini;* for the Legal Foundation of America by *David Crump, Jean F. Powers,* and *Bradley Ford Stuebling;* for the Mid-America Legal Foundation by *John M. Cannon, Susan W. Wanat,* and *Ann Plunkett Sheldon;* for the Mountain States Legal Foundation by *Constance E. Brooks, K. Preston Oade, Jr.,* and *Casey Shpall;* for National Fuel Gas Distribution Corp. et al. by *Stanley W. Widger, Jr., Richard N. George,* and *Thomas C. Hutton;* for Pacific Bell et al. by *Philip B. Kurland, John J. Coffey, Robert V. R. Dalenberg, Margaret deB. Brown, Thomas D. Clarke, Jeffrey E. Jackson,* and *Richard M. Cahill;* for the Pacific Legal Foundation et al. by *Ronald A. Zumbrun* and *John H. Findley;* for Pacific Northwest Bell Telephone Co. et al. by *Robert F. Harrington* and *Thomas H. Nelson;* for Sierra Pacific Power Co. by *Boris H. Lakusta, John Madariaga,* and *James D. Salo;* for the Washington Legal Foundation by *Daniel C. Popeo* and *Paul D. Kamenar;* and for the Wisconsin State Telephone Association et al. by *Robert A. Christensen, Ray J. Riordan, Jr., Philip L. Wettengel, Floyd S. Keene,* and *Renee M. Martin.*

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *John Van de Kamp,* Attorney General of California, *Herschel T. Elkins,* Senior Assistant Attorney General, *Michael R. Botwin,* Deputy Attorney General, *Joseph I. Lieberman,* Attorney General of Connecticut, *William B. Gundling,* Assistant Attorney General, *Elliot F. Gerson,* Deputy Attorney General, *Linley E. Pearson,* Attorney General of Indiana, *William E. Daily,* Deputy Attorney General, *William J. Guste, Jr.,* Attorney General of Louisiana, *Kendall L. Vick,* Assistant Attorney General, *Mike Greely,* Attorney General of Montana, *Patricia*

JUSTICE POWELL announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE BRENNAN, and JUSTICE O'CONNOR join.

The question in this case is whether the California Public Utilities Commission may require a privately owned utility company to include in its billing envelopes speech of a third party with which the utility disagrees.

J. Schaeffer, Assistant Attorney General, *Robert M. Spire*, Attorney General of Nebraska, *John Boehm*, Assistant Attorney General, *Brian McKay*, Attorney General of Nevada, *William E. Isaeff*, Chief Deputy Attorney General, *Paul Bardacke*, Attorney General of New Mexico, *Lacy H. Thornburg*, Attorney General of North Carolina, *Jo Anne Sanford*, Special Deputy Attorney General, *Karen E. Long*, Assistant Attorney General, *Nicholas J. Spaeth*, Attorney General of North Dakota, *Terry L. Adkins*, Assistant Attorney General, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *Robert S. Tongren*, Assistant Attorney General, *Arlene Violet*, Attorney General of Rhode Island, *Constance L. Messore*, Special Assistant Attorney General, *Jim Mattox*, Attorney General of Texas, *Larry J. Laurent*, Assistant Attorney General, *Charlie Brown*, Attorney General of West Virginia, and *David L. Grubb*, Deputy Attorney General; for the State of Illinois et al. by *Neil F. Hartigan*, Attorney General, *Jill Wine-Banks*, Solicitor General, *John W. McCaffrey* and *Rosalyn B. Kaplan*, Assistant Attorneys General, *Robert L. Graham* and *Laura A. Kastor;* for the State of Oregon by *Dave Frohnmayer*, Attorney General, *William F. Gary*, Deputy Attorney General, and *James E. Mountain, Jr.*, Solicitor General; for the State of Wisconsin by *Bronson C. La Follette*, Attorney General, and *David T. Flanagan*, Assistant Attorney General; for the National League of Cities et al. by *Benna Ruth Solomon*, *Joyce Holmes Benjamin*, and *Jonathan B. Sallet;* for the American Federation of Labor and Congress of Industrial Organizations by *Marsha Berzon* and *Laurence Gold;* for the Center for Public Interest Law of the University of San Diego School of Law by *Robert C. Fellmeth;* for the Legal Aid Society of New York City by *Helaine Barnett*, *John E. Kirklin*, and *Kalman Finkel;* for the National Association of State Utility Consumer Advocates et al. by *William Paul Rodgers, Jr.*, *Steven W. Hamm*, and *Raymon E. Lark, Jr.;* and for the New York Citizens' Utility Board, Inc., et al. by *John Cary Sims* and *Alan B. Morrison;* for the Public Service Commission of New York et al. by *David E. Blabey*, *Timothy P. Sheehan*, *Robert Abrams*, Attorney General of New York, and *Peter Bienstock;* for the Telecommunications Research and Action Center et al. by *Andrew J. Schwartzman;* and for the Wisconsin Citizens' Utility Board by *Lee Cullen*.

I

For the past 62 years, appellant Pacific Gas and Electric Company has distributed a newsletter in its monthly billing envelope. Appellant's newsletter, called *Progress*, reaches over three million customers. It has included political editorials, feature stories on matters of public interest, tips on energy conservation, and straightforward information about utility services and bills. App. to Juris. Statement A–66, A–183 to A–190.[1]

In 1980, appellee Toward Utility Rate Normalization (TURN), an intervenor in a ratemaking proceeding before California's Public Utilities Commission, another appellee,[2] urged the Commission to forbid appellant to use the billing envelopes to distribute political editorials, on the ground that appellant's customers should not bear the expense of appellant's own political speech. *Id.*, at A–2. The Commission decided that the envelope space that appellant had used to disseminate *Progress* is the property of the ratepayers. *Id.*, at A–2 to A–3.[3] This "extra space" was defined as "the

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[1] For example, the December 1984 issue of *Progress* included a story on appellant's "automatic payment" and "balanced payment" plans, an article instructing ratepayers on how to weatherstrip their homes, recipes for holiday dishes, and a feature on appellant's efforts to help bald eagles in the Pit River area of California. App. to Juris. Statement A–183 to A–190. When the Commission first addressed the question whether appellant could continue to have exclusive access to its billing envelopes, it noted that *Progress* has previously discussed the merits of recently passed and pending legislation in Congress. *Id.*, at A–66.

[2] In addition to TURN and the Commission, there are five other appellees: Consumers Union, Consumer Federation of California, Common Cause of California, California Public Interest Research Group, and California Association of Utility Shareholders. Only TURN claims a direct interest in the outcome of this case; the other appellees appear to be intervenors concerned only with this case's precedential effects.

[3] The Commission summarized its reasoning as follows:

"[E]nvelope and postage costs and any other costs of mailing bills are a necessary part of providing utility service to the customer . . . . However, due to the nature of postal rates . . . extra space exists in these billing envelopes. . . . Mindful that the extra space is an artifact generated with space remaining in the billing envelope, after inclusion of the monthly bill and any required legal notices, for inclusion of other materials up to such total envelope weight as would not result in any additional postage cost." *Ibid.*

In an effort to apportion this "extra space" between appellant and its customers, the Commission permitted TURN to use the "extra space" four times a year for the next two years. During these months, appellant may use any space not used by TURN, and it may include additional materials if it pays any extra postage. The Commission found that TURN has represented the interests of "a significant group" of appellant's residential customers, *id.*, at A–15, and has aided the Commission in performing its regulatory function, *id.*, at A–49 to A–50. Consequently, the Commission determined that ratepayers would benefit from permitting TURN to use the extra space in the billing envelopes to raise funds and to communicate with ratepayers: "Our goal . . . is to change the present system to one which uses the extra space more efficiently for the ratepayers' benefit. It is reasonable to assume that the ratepayers will benefit more from exposure to a variety of views than they will from only that of PG&E." *Id.*, at A–17. The Commission concluded that appellant could have no interest in excluding TURN's message from the billing envelope since appellant does not own the space that message would fill. *Id.*, at A–23.[4] The Commis-

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ratepayer funds, and is not an intended or necessary item of rate base, and that the only alternative treatment would unjustly enrich PG&E and simultaneously deprive the ratepayers of the value of that space, we concluded that the extra space in the billing envelope 'is properly considered as ratepayer property.'" *Id.*, at A–3.

[4] Commissioners Bagley and Calvo dissented from the Commission's decision to grant TURN access to the billing envelopes. Commissioner Bagley argued that the Commission's order had potentially sweeping consequences for various kinds of property interests:

"The face of every utility-owned dam, the side of every building, the surface of every gas holder rising above our cities, and the bumpers of every utility vehicle—to name just a few relevant examples—have 'excess space' sion placed no limitations on what TURN or appellant could say in the envelope, except that TURN is required to state that its messages are not those of appellant. *Id.*, at A–17 to A–18. The Commission reserved the right to grant other groups access to the envelopes in the future.[5] *Ibid.*

Appellant appealed the Commission's order to the California Supreme Court, arguing that it has a First Amendment right not to help spread a message with which it disagrees, see *Wooley* v. *Maynard*, 430 U. S. 705 (1977), and that the Commission's order infringes that right. The California Supreme Court denied discretionary review. We noted probable jurisdiction, 470 U. S. 1083 (1985), and now reverse.

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and 'economic advertising value.' Some utility corporations place bumper-strip messages on their vehicles. Buses and trucks regularly carry advertising messages. In the words of the majority at page 23 of the decision, 'It is reasonable to assume that the ratepayers will benefit from exposure to a variety of views. . . .' Is it the postulate of this Commission, flowing from the decision's stated premise . . . that ratepayers would benefit from exposure to some particular socially desirable message from some ratepayer group making use of any or all such areas of excess valuable space?" *Id.*, at A–40.

Commissioner Bagley also argued that the Commission's decision would require the Commission to make forbidden content-based distinctions in order to allocate the extra space among competing speakers. *Id.*, at A–41. Commissioner Calvo contended, first, that the order infringed appellant's First Amendment rights, and, second, that it was unnecessary because "TURN has other opportunities to reach its natural audience." *Id.*, at A–56. Commissioner Calvo noted that the Commission often awarded TURN and similar groups fees for their participation in ratemaking proceedings, funds that presumably could finance separate mailings. *Ibid.*

[5] The Commission has already *denied* access to at least one group based on the content of its speech. The Commission denied the application of a taxpayer group—the Committee of More than One Million Taxpayers to Save Proposition 13—on the ground that that group neither wished to participate in Commission proceedings nor alleged that its use of the billing envelope space would improve consumer participation in those proceedings. *Id.*, at A–157 to A–164. The record does not reveal whether any other groups have sought access to the billing envelopes.

II

The constitutional guarantee of free speech "serves significant societal interests" wholly apart from the speaker's interest in self-expression. *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 776 (1978). By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information. See *Thornhill* v. *Alabama*, 310 U. S. 88, 102 (1940); *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 863–864 (1974) (POWELL, J., dissenting). The identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the "discussion, debate, and the dissemination of information and ideas" that the First Amendment seeks to foster. *First National Bank of Boston* v. *Bellotti*, *supra*, at 783 (citations omitted). Thus, in *Bellotti*, we invalidated a state prohibition aimed at speech by corporations that sought to influence the outcome of a state referendum. 435 U. S., at 795. Similarly, in *Consolidated Edison Co.* v. *Public Service Comm'n of N. Y.*, 447 U. S. 530, 544 (1980), we invalidated a state order prohibiting a privately owned utility company from discussing controversial political issues in its billing envelopes. In both cases, the critical considerations were that the State sought to abridge speech that the First Amendment is designed to protect, and that such prohibitions limited the range of information and ideas to which the public is exposed. *First National Bank of Boston* v. *Bellotti*, *supra*, at 776–778, 781–783; *Consolidated Edison Co.* v. *Public Service Comm'n of N. Y.*, *supra*, at 533–535.

There is no doubt that under these principles appellant's newsletter *Progress* receives the full protection of the First Amendment. *Lovell* v. *Griffin*, 303 U. S. 444, 452 (1938). In appearance no different from a small newspaper, *Progress*' contents range from energy-saving tips to stories about wildlife conservation, and from billing information to recipes. App. to Juris. Statement A–183 to A–190. *Progress* thus extends well beyond speech that proposes a business transaction, see *Zauderer* v. *Office of Disciplinary Counsel*, 471 U. S. 626, 637 (1985); *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of N. Y.*, 447 U. S. 557, 561–563 (1980), and includes the kind of discussion of "matters of public concern" that the First Amendment both fully protects and implicitly encourages. *Thornhill* v. *Alabama*, *supra*, at 101.

The Commission recognized as much, but concluded that requiring appellant to disseminate TURN's views did not infringe upon First Amendment rights. It reasoned that appellant remains free to mail its own newsletter except for the four months in which TURN is given access. The Commission's conclusion necessarily rests on one of two premises: (i) compelling appellant to grant TURN access to a hitherto private forum does not infringe appellant's right to speak; or (ii) appellant has no property interest in the relevant forum and therefore has no constitutionally protected right in restricting access to it. We now examine those propositions.

III

Compelled access like that ordered in this case both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set. These impermissible effects are not remedied by the Commission's definition of the relevant property rights.

A

This Court has previously considered the question whether compelling a private corporation to provide a forum for views other than its own may infringe the corporation's freedom of speech. *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974); see also *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, 85–88 (1980); *id.*, at 98–100 (POWELL, J., joined by WHITE, J., concurring in part and in judgment). *Tornillo* involved a challenge to Florida's right-of-reply statute. The Florida law provided that, if a newspaper assailed a candidate's character or record, the candidate could demand that the newspaper print a reply of equal prominence and space. 418 U. S., at 244–245, and n. 2.

We found that the right-of-reply statute directly interfered with the newspaper's right to speak in two ways. *Id.*, at 256. First, the newspaper's expression of a particular viewpoint triggered an obligation to permit other speakers, with whom the newspaper disagreed, to use the newspaper's facilities to spread their own message. The statute purported to advance free discussion, but its effect was to deter newspapers from speaking out in the first instance: by forcing the newspaper to disseminate opponents' views, the statute penalized the newspaper's own expression. We therefore concluded that a "[g]overnment-enforced right of access *inescapably* 'dampens the vigor and limits the variety of public debate.'" *Id.*, at 257 (emphasis added) (quoting *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 279 (1963).[6]

Second, we noted that the newspaper's "treatment of public issues and public officials—whether fair or unfair—constitute[s] the exercise of editorial control and judgment." 418 U. S., at 258. Florida's statute interfered with this "editorial control and judgment" by forcing the newspaper to tailor its speech to an opponent's agenda, and to respond to candidates' arguments where the newspaper might prefer to be silent. Cf. *Wooley* v. *Maynard*, 430 U. S., at 714; *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 633–634

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[6] This Court has sustained a limited government-enforced right of access to broadcast media. *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367 (1969). Cf. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S. 94 (1973). Appellant's billing envelopes do not, however, present the same constraints that justify the result in *Red Lion:* "[A] broadcaster communicates through use of a scarce, publicly owned resource. No person can broadcast without a license, whereas all persons are free to send correspondence to private homes through the mails." *Consolidated Edison Co.* v. *Public Service Comm'n of N. Y.*, 447 U. S. 530, 543 (1980).

(1943). Since *all* speech inherently involves choices of what to say and what to leave unsaid, this effect was impermissible. As we stated last Term: "'The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas. . . . There is necessarily . . . a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.'" *Harper & Row Publishers, Inc.* v. *Nation Enterprises*, 471 U. S. 524, 559 (1985) (quoting *Estate of Hemingway* v. *Random House*, 23 N. Y. 2d 341, 348, 244 N. E. 2d 250, 255 (1968)) (emphasis in original). See *PruneYard*, *supra*, at 99–100 (opinion of POWELL, J.).

The concerns that caused us to invalidate the compelled access rule in *Tornillo* apply to appellant as well as to the institutional press.[7] See *First National Bank of Boston* v. *Bellotti*, 435 U. S., at 782–784. Cf. *Lovell* v. *Griffin*, 303 U. S., at 452. Just as the State is not free to "tell a newspaper in advance what it can print and what it cannot," *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U. S. 376, 400 (1973) (Stewart, J., dissenting); see also *PruneYard*, *supra*, at 88, the State is not free either to restrict appellant's speech to certain topics or views or to force appellant to respond to views that others may hold. *Consolidated Edi-*

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[7] Unlike the right-of-reply statute at issue in *Tornillo*, the Commission's order does not require appellant to place TURN's message in appellant's newsletter. Instead, the Commission ordered appellant to place TURN's message in appellant's envelope four months out of the year. Like the Miami Herald, however, appellant is still required to carry speech with which it disagreed, and might well feel compelled to reply or limit its own speech in response to TURN's.

The Court's opinion in *Tornillo* emphasizes that the right-of-reply statute impermissibly deterred protected speech. 418 U. S., at 256–257. In the last paragraph of the opinion, the Court concluded that an *independent* ground for invalidating the statute was its effect on editors' allocation of scarce newspaper space. *Id.*, at 258. See also *id.*, at 257, n. 22. That discussion in no way suggested that the State was free otherwise to burden the newspaper's speech as long as the actual paper on which the newspaper was printed was not invaded.

son Co. v. *Public Service Comm'n of N. Y.*, 447 U. S., at 533–535. See *PruneYard*, 447 U. S., at 100 (opinion of POWELL, J.); *Abood* v. *Detroit Board of Education*, 431 U. S. 209, 241 (1977). Under *Tornillo* a forced access rule that would accomplish these purposes indirectly is similarly forbidden.

The Court's decision in *PruneYard Shopping Center* v. *Robins*, *supra*, is not to the contrary. In *PruneYard*, a shopping center owner sought to deny access to a group of students who wished to hand out pamphlets in the shopping center's common area. The California Supreme Court held that the students' access was protected by the State Constitution; the shopping center owner argued that this ruling violated *his* First Amendment rights. This Court held that the shopping center did not have a constitutionally protected right to exclude the pamphleteers from the area open to the public at large. *Id.*, at 88. Notably absent from *PruneYard* was any concern that access to this area might affect the shopping center owner's exercise of his own right to speak: the owner did not even allege that he objected to the content of the pamphlets; nor was the access right content based. *PruneYard* thus does not undercut the proposition that forced associations that burden protected speech are impermissible.[8]

B

The Commission's order is inconsistent with these principles. The order does not simply award access to the public at large; rather, it discriminates on the basis of the viewpoints of the selected speakers. Two of the acknowledged purposes of the access order are to offer the public a greater variety of views in appellant's billing envelope, and to assist groups (such as TURN) that challenge appellant in the Commission's ratemaking proceedings in raising funds. App. to Juris. Statement A–16 to A–17. Access to the envelopes thus is not content neutral. The variety of views that the Commission seeks to foster cannot be obtained by including speakers whose speech agrees with appellant's. Similarly, the perceived need to raise funds to finance participation in ratemaking proceedings exists only where the relevant groups represent interests that diverge from appellant's interests. Access is limited to persons or groups—such as TURN—who disagree with appellant's views as expressed in *Progress* and who oppose appellant in Commission proceedings.[9]

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[8] In addition, the relevant forum in *PruneYard* was the open area of the shopping center into which the general public was invited. This area was, almost by definition, peculiarly public in nature. *PruneYard*, 447 U. S., at 83, 88. There is no correspondingly public aspect to appellant's billing envelopes. See *post*, at 22–23 (MARSHALL, J., concurring in judgment).

Such one-sidedness impermissibly burdens appellant's own expression. *Tornillo* illustrates the point. Access to the newspaper in that case was content based in two senses: (i) it was triggered by a particular category of newspaper speech, and (ii) it was awarded only to those who disagreed with the newspaper's views. The Commission's order is not, in *Tornillo*'s words, a "content-based penalty" in the first sense, because TURN's access to appellant's envelopes is not conditioned on any particular expression by appellant. Cf. *Tornillo*, 418 U. S., at 256. But because access is awarded only to those who disagree with appellant's views and who are hostile to appellant's interests, appellant must contend with the fact that whenever it speaks out on a given issue, it may be forced—at TURN's discretion—to help disseminate hostile views. Appellant "might well conclude" that, under these circumstances, "the safe course is to avoid controversy," thereby reducing the free flow of information and ideas that the First Amendment seeks to promote. *Id.*, at 257.

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[9] This is fully borne out by the order that triggered this appeal. TURN, the only entity to receive access to appellant's billing envelope, purports to represent the interest of a group of appellant's customers: residential ratepayers. App. to Juris. Statement A–14. The Commission's opinion plausibly assumes that the interest of residential ratepayers will often conflict with appellant's interest. *Id.*, at A–50.

Nor does the fact that TURN will use the envelopes to make fundraising appeals lessen the burden on appellant's speech. Cf. *post*, at 36–37 (STEVENS, J., dissenting). The Commission has "disavowed any intention of looking at the way that TURN solicits funds," leaving TURN free to "speak and advocate its own position as best it can" in its billing envelope inserts. Tr. Oral Arg. 31–32, 39. Thus, while TURN's advocacy may be aimed at convincing ratepayers to make donations, that goal does not alter the open-ended nature of the access awarded in this case, because it does not restrict the scope or content of TURN's message. Cf. *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U. S. 640, 647 (1981).

Appellant does not, of course, have the right to be free from vigorous debate. But it *does* have the right to be free from government restrictions that abridge its own rights in order to "enhance the relative voice" of its opponents. *Buckley* v. *Valeo*, 424 U. S. 1, 49, and n. 55 (1976). The Commission's order requires *appellant* to assist in disseminating *TURN*'s views; it does not equally constrain both sides of the debate about utility regulation.[10] This kind of favoritism goes well beyond the fundamentally content-neutral subsidies that we sustained in *Buckley* and in *Regan* v. *Taxation With Representation of Washington,* 461 U. S. 540 (1983). See *Buckley, supra* at 97–105 (sustaining funding of general election campaign expenses of major party candidates); *Regan, supra,* at 546–550 (sustaining tax deduction for contributors to veterans' organizations). Unlike these permissible government subsidies of speech, the Commission's order identifies a favored speaker "based on the identity of the interests that [the speaker] may represent," *First National Bank of Boston* v. *Bellotti,* 435 U. S., at 784, and forces the speaker's opponent—not the taxpaying public—to assist in disseminating the speaker's message. Such a requirement necessarily burdens the expression of the disfavored speaker.

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[10] JUSTICE STEVENS analogizes this aspect of the Commission's order to Securities and Exchange Commission regulations that require management to transmit proposals of minority shareholders in shareholder mailings. *Post*, at 39–40. The analogy is inappropriate. The regulations JUSTICE STEVENS cites differ from the Commission's order in two important ways. First, they allocate shareholder property between management and certain groups of shareholders. Management has no interest in corporate property except such interest as derives from the shareholders; therefore, regulations that limit management's ability to exclude some shareholders' views from corporate communications do not infringe corporate First Amendment rights. Second, the regulations govern speech by a corporation *to itself*. *Bellotti* and *Consolidated Edison* establish that the Constitution protects corporations' right to speak to the public based on the informational value of corporate speech. *Supra*, at 8. Rules that define how corporations govern themselves do not limit the range of information that the corporation may contribute to the public debate. The Commission's order, by contrast, burdens appellant's right freely to speak to the public at large.

The Commission's access order also impermissibly requires appellant to associate with speech with which appellant may disagree. The order on its face leaves TURN free to use the billing envelopes to discuss any issues it chooses.[11] Should TURN choose, for example, to urge appellant's customers to vote for a particular slate of legislative candidates, or to argue in favor of legislation that could seriously affect the utility business, appellant may be forced either to appear to agree with TURN's views or to respond. *PruneYard,* 447 U. S., at 98–100 (opinion of POWELL, J.).[12] This pressure to respond "is particularly apparent when the owner has taken a position opposed to the view being expressed on his property." *Id.*, at 100. Especially since TURN has been given access in part to create a multiplicity of views in the envelopes, there can be little doubt that appellant will feel compelled to respond to arguments and allegations made by TURN in its messages to appellant's customers.

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[11] The presence of a disclaimer on TURN's messages, see *supra,* at 7, does not suffice to eliminate the impermissible pressure on appellant to respond to TURN's speech. The disclaimer serves only to avoid giving readers the mistaken impression that TURN's words are really those of appellant. *PruneYard,* 447 U. S., at 99 (opinion of POWELL, J.). It does nothing to reduce the risk that appellant will be forced to respond when there is strong disagreement with the substance of TURN's message. *Ibid.*

[12] The Commission's order is thus readily distinguishable from orders requiring appellant to carry various legal notices, such as notices of upcoming Commission proceedings or of changes in the way rates are calculated. The State, of course, has substantial leeway in determining appropriate information disclosure requirements for business corporations. See

That kind of forced response is antithetical to the free discussion that the First Amendment seeks to foster. *Harper & Row*, 471 U. S., at 559. See also *Wooley* v. *Maynard*, 430 U. S., at 714.[13] For corporations as for individuals, the choice to speak includes within it the choice of what not to say. *Tornillo*, *supra*, at 258. And we have held that speech does not lose its protection because of the corporate identity of the speaker. *Bellotti*, *supra*, at 777; *Consolidated Edison*, 447 U. S., at 533. Were the government freely able to compel corporate speakers to propound political messages with which they disagree, this protection would be empty, for the government could require speakers to affirm in one breath that which they deny in the next. It is therefore incorrect to say, as do appellees, that our decisions do not limit the government's authority to compel speech by corporations. The danger that appellant will be required to alter its own message as a consequence of the government's coercive action is a proper object of First Amendment solicitude, because the message itself is protected under our decisions in *Bellotti* and *Consolidated Edison*. Where, as in this case, the danger is one that arises from a content-based grant

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Zauderer v. *Office of Disciplinary Counsel*, 471 U. S. 626, 651 (1985). Nothing in *Zauderer* suggests, however, that the State is equally free to require corporations to carry the messages of third parties, where the messages themselves are biased against or are expressly contrary to the corporation's views.

[13] As we stated in *Wooley*, "[a] system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts." 430 U. S., at 714.

of access to private property, it is a danger that the government may not impose absent a compelling interest.

C

The Commission has emphasized that appellant's customers own the "extra space" in the billing envelopes. App. to Juris. Statement A–64 to A–66. According to appellees, it follows that appellant cannot have a constitutionally protected interest in restricting access to the envelopes. This argument misperceives both the relevant property rights and the nature of the State's First Amendment violation.[14]

The Commission expressly declined to hold that under California law appellant's customers own the entire billing envelopes and everything contained therein. *Id.*, at A–2 to A–3. It decided only that the ratepayers own the "extra space" in the envelope, defined as that space left over after including the bill and required notices, up to a weight of one ounce. *Ibid.* The envelopes themselves, the bills, and *Progress* all remain appellant's property. The Commission's access order thus clearly requires appellant to use *its* property as a vehicle for spreading a message with which it disagrees. In *Wooley* v. *Maynard*, we held that New Hampshire could not require two citizens to display a slogan on their license plates and thereby "use their private property as a 'mobile billboard' for the State's ideological message." 430 U. S., at 715. The "private property" that was used to spread the unwelcome message was the automobile, not the license plates. Similarly, the Commission's order requires appellant to use its property—the billing envelopes—to distribute the message of another. This is so whoever is deemed to own the "extra space."

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[14] Appellees also argue that appellant's status as a regulated utility company lessens its right to be free from state regulation that burdens its speech. We have previously rejected this argument. *Consolidated Edison Co.* v. *Public Service Comm'n of N. Y.*, 447 U. S., at 534, n. 1 ("Consolidated Edison's position as a regulated monopoly does not decrease the informative value of its opinions on critical public matters"). See also *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of N. Y.*, 447 U. S. 557, 566–568 (1980).

A different conclusion would necessarily imply that our decision in *Tornillo* rested on the Miami Herald's ownership of the space that would have been used to print candidate replies. Nothing in *Tornillo* suggests that the result would have been different had the Florida Supreme Court decided that the newspaper space needed to print candidates' replies was the property of the newspaper's readers, or had the court ordered the Miami Herald to distribute inserts owned and prepared by the candidates together with its newspapers. The constitutional difficulty with the right-of-reply statute was that it required the newspaper to disseminate a message with which the newspaper disagreed. This difficulty did not depend on whether the particular paper on which the replies were printed belonged to the newspaper or to the candidate.

Appellees' argument suffers from the same constitutional defect. The Commission's order forces appellant to disseminate TURN's speech in envelopes that appellant owns and that bear appellant's return address. Such forced association with potentially hostile views burdens the expression of views different from TURN's and risks forcing appellant to speak where it would prefer to remain silent. Those effects do not depend on who "owns" the "extra space."[15]

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[15] As the dissenting Commissioners correctly noted, see n. 4, *supra*, appellees' argument logically implies that the State may compel appellant or any other regulated business to use many different kinds of property to advance views with which the business disagrees. "Extra space" exists not only in billing envelopes but also on billboards, bulletin boards, and sides of buildings and motor vehicles. Under the Commission's reasoning, a State could force business proprietors of such items to use the space for the dissemination of speech the proprietor opposes. At least where access to such fora is granted on the basis of the speakers' viewpoints, the public's ownership of the "extra space" does not nullify the First Amendment rights of the owner of the property from which that space derives.

IV

Notwithstanding that it burdens protected speech, the Commission's order could be valid if it were a narrowly tailored means of serving a compelling state interest. *Consolidated Edison Co.* v. *Public Service Comm'n of N. Y.*, 447 U. S., at 535; *First National Bank of Boston* v. *Bellotti*, 435 U. S., at 786. Appellees argue that the access order does in fact further compelling state interests. In the alternative, appellees argue that the order is a permissible time, place, or manner restriction. We consider these arguments in turn.

A

Appellees identify two assertedly compelling state interests that the access order is said to advance. First, appellees argue that the order furthers the State's interest in effective ratemaking proceedings. TURN has been a regular participant in those proceedings, and the Commission found that TURN has aided the Commission in performing its regulatory task. Appellees argue that the access order permits TURN to continue to help the Commission by assisting TURN in raising funds from the ratepayers whose interest TURN seeks to serve.

The State's interest in fair and effective utility regulation may be compelling. The difficulty with appellees' argument is that the State can serve that interest through means that would not violate appellant's First Amendment rights, such as awarding costs and fees.[16] The State's interest may justify imposing on appellant the reasonable expenses of responsible groups that represent the public interest at ratemaking proceedings. But "we find 'no substantially relevant correlation between the governmental interest asserted and the State's effort'" to compel appellant to distribute TURN's speech in appellant's envelopes. *First National Bank of*

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[16] Indeed, the Commission already does this. See n. 4, *supra* (discussing Commissioner Calvo's dissent).

Boston v. *Bellotti, supra,* at 795 (quoting *Shelton* v. *Tucker,* 364 U. S. 479, 485 (1960)).

Second, appellees argue that the order furthers the State's interest in promoting speech by making a variety of views available to appellant's customers. Cf. *Buckley* v. *Valeo,* 424 U. S., at 92–93, and n. 127. We have noted above that this interest is not furthered by an order that is not content neutral. Moreover, the means chosen to advance variety tend to inhibit expression of appellant's views in order to promote TURN's. Our cases establish that the State cannot advance some points of view by burdening the expression of others. *First National Bank of Boston* v. *Bellotti, supra,* at 785–786; *Buckley* v. *Valeo, supra,* at 48–49. It follows that the Commission's order is not a narrowly tailored means of furthering this interest.

B

Appellees argue, finally, that the Commission's order is a permissible time, place, or manner regulation, since it "serve[s] a significant governmental interest and leave[s] ample alternative channels for communication." *Consolidated Edison Co.* v. *Public Service Comm'n of N. Y., supra,* at 535; see also *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council, Inc.,* 425 U. S. 748, 771 (1976). For a time, place, or manner regulation to be valid, it must be neutral as to the content of the speech to be regulated. *Clark* v. *Community for Creative Non-Violence,* 468 U. S. 288, 293 (1984); see also *Erznoznik* v. *City of Jacksonville,* 422 U. S. 205, 210–212 (1975). As we have shown, the State's asserted interest in exposing appellant's customers to a variety of viewpoints is not—and does not purport to be—content neutral.

V

We conclude that the Commission's order impermissibly burdens appellant's First Amendment rights because it forces appellant to associate with the views of other speakers, and because it selects the other speakers on the basis of their viewpoints. The order is not a narrowly tailored means of furthering a compelling state interest, and it is not a valid time, place, or manner regulation.

For these reasons, the decision of the California Public Utilities Commission must be vacated. The case is remanded to the California Supreme Court for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN took no part in the consideration or decision of this case.

CHIEF JUSTICE BURGER, concurring.

I join JUSTICE POWELL's opinion, but think we need not go beyond the authority of *Wooley* v. *Maynard*, 430 U. S. 705 (1977), to decide this case. I would not go beyond the central question presented by this case, which is the infringement of Pacific's right to be free from forced association with views with which it disagrees. I would also rely on that part of *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974), holding that a forced right of reply violates a newspaper's right to be free from forced dissemination of views it would not voluntarily disseminate, just as we held that Maynard must be free from being forced by the State to disseminate views with which he disagreed. To compel Pacific to mail messages for others cannot be distinguished from compelling it to carry the messages of others on its trucks, its buildings, or other property used in the conduct of its business. For purposes of this case, those properties cannot be distinguished from property like the mailing envelopes acquired by Pacific from its income and resources.

JUSTICE MARSHALL, concurring in the judgment.

In *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74 (1980), we held that a State could, consistently with the Federal Constitution, prohibit the private owner of a shopping center from using state trespass law to exclude peaceful expressive activity in the open areas of the shopping center. Concurring in *PruneYard*, I viewed the State's abrogation of the property owner's traditional right to exclude as raising the question of how the Federal Constitution limits a State's ability to redefine its common-law property rights. See *id.*, at 92–93 (MARSHALL, J., concurring). Today we face a similar question. In the present case, California has taken from appellant the right to deny access to its property—its billing envelope—to a group that wishes to use that envelope for expressive purposes. Two significant differences between the State's grant of access in this case and the grant of access in *PruneYard* lead me to find a constitutional barrier here that I did not find in the earlier case.

The first difference is the degree of intrusiveness of the permitted access. We noted in *PruneYard:* "[T]he shopping center by choice of its owner is not limited to the personal use of [its owner]. It is instead a business establishment that is open to the public to come and go as they please." *Id.*, at 87. The challenged rule did not permit a markedly greater intrusion onto the property than that which the owner had voluntarily encouraged, nor did it impair the commercial value of the property. *Id.*, at 83; see also *id.*, at 94 (MARSHALL, J., concurring).

In the present case, by contrast, appellant has never opened up its billing envelope to the use of the public.[1] Appellant has not abandoned its right to exclude others from its property to the degree that the shopping center owner had done in *PruneYard.* Were appellant to use its billing envelope as a sort of community billboard, regularly carrying the messages of third parties, its desire to exclude a particular speaker would be deserving of lesser solicitude. As matters stand, however, appellant has issued no invitation to the general public to use its billing envelope for speech or for any other purpose.[2] Moreover, the shopping center in *PruneYard* bore a strong resemblance to the streets and parks that are traditional public forums. People routinely gathered there, at the owner's invitation, and engaged in a wide variety of activities. Adding speech to the list of those activities did not in any great way change the complexion of the property. The same is not true in this case.

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[1] The State seizes upon appellant's status as a regulated monopoly in order to argue that the inclusion of postage and other billing costs in the utility's rate base demonstrates that these items "belong" to the public, which has paid for them. However, a consumer who purchases food in a grocery store is "paying" for the store's rent, heat, electricity, wages, etc., but no one would seriously argue that the consumer thereby acquires a property interest in the store. That the utility passes on its overhead costs to ratepayers at a rate fixed by law rather than the market cannot affect the utility's ownership of its property, nor its right to use that property for expressive purposes, see *Consolidated Edison Co.* v. *Public Service Comm'n of N. Y.*, 447 U. S. 530, 534, n. 1 (1980). The State could have concluded that the public interest would be best served by state own-

The second difference between this case and *PruneYard* is that the State has chosen to give TURN a right to speak at the expense of appellant's ability to use the property in ques-

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ership of utilities. Having chosen to keep utilities in private hands, however, the State may not arbitrarily appropriate property for the use of third parties by stating that the public has "paid" for the property by paying utility bills.

I hasten to add that nothing in this opinion nor, as I understand it, the plurality's opinion, addresses the issue whether the State may exclude the cost of mailing *Progress* from appellant's rate base. See *id.*, at 544 (MARSHALL, J., concurring). Indeed, appellant concedes that the State may force its shareholders to bear those costs.

[2] The State also argues that it frequently requires appellant to carry messages concerning utility ratemaking and the rights of utility consumers. These messages, however, do not include political speech, and are directly relevant to commercial transactions between the ratepayer and the utility. The State's interest in requiring appellant to carry such messages is therefore particularly compelling. Cf. *infra*, at 24–25. Somewhat analogously, the State could not argue that, because it may demand access for the State's agents to a private home to monitor compliance with health or safety regulations, see *Camara* v. *Municipal Court*, 387 U. S. 523 (1967), it may also grant access to third parties for nongovernmental purposes.

tion as a forum for the exercise of its own First Amendment rights. While the shopping center owner in *PruneYard* wished to be free of unwanted expression, he nowhere alleged that his own expression was hindered in the slightest. In contrast, the present case involves a forum of inherently limited scope. By appropriating, four times a year, the space in appellant's envelope that appellant would otherwise use for its own speech, the State has necessarily curtailed appellant's use of its own forum. The regulation in this case, therefore, goes beyond a mere infringement of appellant's desire to remain silent, see *post*, at 32–35 (REHNQUIST, J., dissenting).

While the interference with appellant's speech is, concededly, very slight, the State's justification—the subsidization of another speaker chosen by the State—is insufficient to sustain even that minor burden. We have held that the State may use its own resources for subsidization, *Regan* v. *Taxation With Representation of Washington*, 461 U. S. 540 (1983), but that interest, standing alone, cannot justify interference with the speech of others. See *Buckley* v. *Valeo*, 424 U. S. 1, 48–49 (1976) *(per curiam); First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 790–792 (1978).[3] In the

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[3] JUSTICE REHNQUIST's dissent argues that a State may freely affect the mix of information available to the public, so long as it only "indirectly and remotely" affects a particular speaker's contribution to that mix. See *post*, at 27. Even if I were to accept that proposition, I disagree with its application to this case.

While the interference with appellant's speech is small, it is by no means indirect. TURN clearly has the first claim to the "extra space" during four months out of every year. Appellant may use its own—and physically limited—forum during those months only to the extent TURN chooses not to use it. This infringement differs from the limitation on campaign contributions in *Buckley* v. *Valeo* because the speech element of a contribution—the message of support for a candidate—was only indirectly related to the size of the contribution. 424 U. S., at 21. By definition, then, a limit on the size of contributions affected speech only indirectly. *Regan* v. *Taxation With Representation of Washington*, 461 U. S. 540 (1983), is likewise distinguishable. That case decided only that the instant case, the only state interest identified by appellees is ensuring that ratepayers are "expos[ed] to a variety of views," App. to Juris. Statement A–17, in order to provide "the most complete understanding possible of energy-related issues," *id.*, at A–22. This is no different from the interest that we found insufficient to justify restraints on individual political expenditures in *Buckley* v. *Valeo, supra.* Even assuming that the State could assert a more compelling interest in, for example, curbing actual abuses of the ratemaking process, it has never demonstrated that its regulation is tailored to serve such an interest. Indeed, it disclaims any duty to make that showing, based on its conclusion that ratepayers "own" the extra space. See App. to Juris. Statement A–22. The regulation at issue here, therefore, differs significantly from the Securities and Exchange Commission proxy regulation cited by JUSTICE STEVENS, *post*, at 39.

In *PruneYard*, I recognized that the State may generally create or abrogate rights "'to attain a permissible legislative object.'" 447 U. S., at 92 (quoting *Silver* v. *Silver*, 280 U. S. 117, 122 (1929)). In the present case, the State has redefined a property right in the extra space in appellant's billing envelope in such a way as to achieve a result—burdening the speech of one party in order to enhance the speech of another—that the First Amendment disallows. In doing so, moreover, it has sanctioned an intrusion onto appellant's property that exceeds the slight incursion permitted in *PruneYard*. Under these circumstances, I believe that the State has crossed the boundary between constitutionally permissible and impermissible redefinitions of private property.

In reaching this conclusion, I do not mean to suggest that I would hold, contrary to our precedents, that the corporation's First Amendment rights are coextensive with those of individuals, or that commercial speech enjoys the same pro-

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Government could use its own funds to subsidize a preferred speaker. That subsidization caused *no* interference with anyone else's speech, much less indirect and remote interference.

tections as individual speech. In essentially all instances, the use of business property to carry out transactions with the general public will permit the State to restrict or mandate speech in order to prevent deception or otherwise protect the public's health and welfare. In many instances, such as in *PruneYard*, business property will be open to the public to such an extent that the public's expressive activities will not interfere with the owner's use of property to a degree that offends the Constitution. The regulation at issue in this case, I believe, falls on the other side of the line. Accordingly, I join the Court's judgment.

JUSTICE REHNQUIST, with whom JUSTICE WHITE and JUSTICE STEVENS join as to Part I, dissenting.

The plurality concludes that a state-created, limited right of access to the extra space in a utility's billing envelopes unconstitutionally burdens the utility's right to speak if the utility has used the space itself to express political views to its customers. This is so even though the extra envelope space belongs to the customers as a matter of state property law. The plurality justifies its conclusion on grounds that the right of access may (1) deter the utility from saying things that might trigger an adverse response, or (2) induce it to respond to subjects about which it might prefer to remain silent, in violation of the principles established in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974), and *Wooley* v. *Maynard*, 430 U. S. 705 (1977). I do not believe that the right of access here will have any noticeable deterrent effect. Nor do I believe that negative free speech rights, applicable to individuals and perhaps the print media, should be extended to corporations generally. I believe that the right of access here is constitutionally indistinguishable from the right of access approved in *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74 (1980), and therefore I dissent.[1]

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[1] This case does not involve the question whether the First Amendment provides a right of access to a private forum. See *Hudgens* v. *NLRB*, 424

I

This Court established in *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765 (1978), that the First Amendment prohibits the government from *directly* suppressing the affirmative speech of corporations. A newspaper publishing corporation's right to express itself freely is also implicated by governmental action that penalizes speech, see *Miami Herald Publishing Co.* v. *Tornillo*, *supra*, because the deterrent effect of a penalty is very much like direct suppression. Our cases cannot be squared, however, with the view that the First Amendment prohibits governmental action that only *indirectly* and *remotely* affects a speaker's contribution to the overall mix of information available to society.

Several cases illustrate this point. In *Buckley* v. *Valeo*, 424 U. S. 1 (1976) *(per curiam)*, the Court upheld limits on political campaign contributions despite the argument that their likely effect would be "to mute the voices of affluent persons and groups in the election process and thereby to equalize the relative ability of all citizens to affect the outcome of elections." *Id.*, at 25–26. The Court explained that the potential effect on affluent speech of limiting access to this one forum was constitutionally insignificant because of the availability of other forums, *id.*, at 26, n. 26, and that the limitation protected the integrity of our representative democracy by limiting political *quid pro quos* and the appearance of corruption, *id.*, at 26–27. The Court also upheld a provision granting different levels of subsidies for Presidential campaigns depending upon whether the party receiving the subsidy is a major, minor, or new party. *Id.*, at 87–88. The Court reasoned that the effect of the provision was "not

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U. S. 507 (1976); *Marsh* v. *Alabama*, 326 U. S. 501 (1946). The right of access in this case was granted by state law. See *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74 (1980); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974); cf. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S. 94 (1973); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367 (1969).

to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion." *Id.*, at 92–93. Similarly, in *Regan* v. *Taxation With Representation of Washington*, 461 U. S. 540 (1983), the Court upheld a governmental decision to grant a subsidy to certain expressive groups yet deny it to others, depending on whether the groups served the statutory definition of public interest, even though this had the undeniable effect of enhancing the speech of some groups over the speech of others. The Court explained that Congress is free to subsidize some but not all speech. *Id.*, at 548.

PruneYard Shopping Center v. *Robins*, *supra*, illustrates the point in a case that is very similar to the one decided today. The State of California interpreted its own Constitution to afford a right of access to private shopping centers for the reasonable exercise of speech and petitioning. *Id.*, at 78. While acknowledging that the First Amendment does not itself grant a right of access to private forums, *id.*, at 80–81, the Court upheld the state-created right against a First Amendment challenge. See *id.*, at 85–88. It reasoned that *Wooley* v. *Maynard*, *supra*, does not prohibit such a right of access because the views of those taking advantage of the right would not likely be identified with those of the owners, the State was not dictating any specific message, and the owners were free to disavow any connection to the message by posting disclaimers. 447 U. S., at 87. The Court similarly distinguished *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624 (1943), stating that the right of access did not compel the owners to affirm their belief in government orthodoxy, and left them free to publicly dissociate themselves from the views of the speakers. 447 U. S., at 87–88. Finally, it distinguished *Miami Herald Publishing Co.* v. *Tornillo*, *supra*, on the ground that the right of access did not constitute a content-based penalty that would "'dampe[n] the vigor and limi[t] the variety of public debate.'" 447 U. S., at 88, quoting *Tornillo*, *supra*, at 257.

Of course, the First Amendment does prohibit governmental action affecting the mix of information available to the public if the effect of the action approximates that of direct content-based suppression of speech. Thus, while the Court in *Buckley* v. *Valeo*, *supra*, upheld limits on campaign contributions and allowed disparate governmental subsidies to various political parties, it struck down limitations on campaign expenditures because such limits "impose far greater restraints on the freedom of speech and association." *Id.*, at 44.[2] The Court reasoned that the Government's interest in equalizing the relative influence of individuals over election outcomes could not overcome the First Amendment, which was designed to encourage the widest dissemination of diverse views. *Id.*, at 44–45. Similarly, the Court suggested in *Regan* v. *Taxation With Representation of Washington*, *supra*, that governmental subsidies aimed at the suppression of dangerous ideas might not pass constitutional muster. *Id.*, at 550.

Miami Herald Publishing Co. v. *Tornillo*, 418 U. S. 241 (1974), held that a governmentally imposed "penalty" for the exercise of protected speech is sufficiently like direct suppression to trigger heightened First Amendment scrutiny. The Court in *Tornillo* struck down a statute granting political candidates a right to reply any time a private newspaper criticized them. See *id.*, at 244. The Court reasoned that the statute violated the First Amendment because it "exact[ed] a penalty on the basis of the content of a newspaper," *id.*, at 256, that would likely have the effect of "'dampe[ning] the vigor and limi[ting] the variety of public debate.'" *Id.*, at 257, quoting *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 279 (1964).

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[2] This was the critical distinction between the contribution and expenditure limitations, and not the relative worth of the respective governmental interests. The Court in *Buckley* v. *Valeo* never suggested that the interest served by the campaign limitation provision was a "compelling" one, nor examined the provision to determine whether it was sufficiently tailored to the interest to survive "heightened scrutiny." The Court was satisfied that the provision had only an indirect and minimal effect on First Amendment interests, as well as a rational basis. Nor did the Court treat the expenditure limitations differently because the governmental justification was less important. Instead, the relatively greater effect of these limitations on affirmative speech triggered heightened scrutiny, and a rational basis was no longer sufficient to justify them. See *Buckley*, 424 U. S., at 44–45.

Although the plurality draws its deterrence rationale from *Tornillo*, it does not even attempt to characterize the right of access as a "penalty"; indeed, such a Procrustean effort would be doomed to failure. Instead, the plurality stretches *Tornillo* to stand for the general proposition that the First Amendment prohibits any regulation that deters a corporation from engaging in some expressive behavior. But the deterrent effect of any statute is an empirical question of degree. When the potential deterrent effect of a particular state law is remote and speculative, the law simply is not subject to heightened First Amendment scrutiny. See *supra*, at 27–29, and n. 2. The plurality does not adequately explain how the potential deterrent effect of the right of access here is sufficiently immediate and direct to warrant strict scrutiny. While a statutory penalty, like the right-of-reply statute in *Tornillo*, may sufficiently deter speech to trigger such heightened First Amendment scrutiny, the right of access here will not have such an effect on PG&E's incentives to speak.

The record does not support the inference that PUC issued its order to penalize PG&E because of the content of its inserts or because PG&E included the inserts in its billing envelopes in the first place. The order does not prevent PG&E from using the billing envelopes in the future to distribute inserts whenever it wishes. Nor does its vitality depend on whether PG&E includes inserts in any future billing envelopes. Moreover, the central reason for the access order—to provide for an effective ratepayer voice—would not vary in importance if PG&E had never distributed the inserts or ceased distributing them tomorrow. The most that can be said about the connection between the inserts and the order is that the existence of the inserts quite probably brought to TURN's attention the possibility of requesting access.

Nor does the access order create any cognizable risk of deterring PG&E from expressing its views in the most candid fashion. Unlike the reply statute in *Tornillo*, which conditioned access upon discrete instances of certain expression, the right of access here bears no relationship to PG&E's future conduct. PG&E cannot prevent the access by remaining silent or avoiding discussion of controversial subjects. The plurality suggests, however, that the possibility of minimizing the undesirable content of TURN's speech may induce PG&E to adopt a strategy of avoiding certain topics in hopes that TURN will not think to address them on its own. But this is an extremely implausible prediction. The success of such a strategy would depend on any group given access being little more than a reactive organization. TURN or any other group eventually given access will likely address the controversial subjects in spite of PG&E's silence. I therefore believe that PG&E will have no incentive to adopt the conservative strategy. Accordingly, the right of access should not be held to trigger heightened First Amendment scrutiny on the ground that it somehow might deter PG&E's right to speak.

II

The plurality argues, however, that the right of access also implicates PG&E's right not to speak or to associate with the speech of others, thereby triggering heightened scrutiny. The thrust of the plurality's argument is that if TURN has access to the envelopes, its speech will have the effect of *forcing* PG&E to address topics about which it would prefer to remain silent. The plausibility of any such prediction depends upon the perceived ineffectiveness of a disclaimer or the absence of any effective alternative means for consumer groups like TURN to communicate to the ratepayers. In

PruneYard Shopping Center v. *Robins*, 447 U. S. 74 (1980), this Court held that the availability of an effective disclaimer was sufficient to eliminate any infringement upon negative free speech rights. *Id.*, at 87–88. If an alternative forum of communication exists, TURN or the other consumer groups will be able to *induce* PG&E to address the additional topics anyway. Finally, because PG&E retains complete editorial freedom over the content of its inserts, the effect of the right of access is likely to be qualitatively different from a direct prescription by the government of "what shall be orthodox in . . . matters of opinion." *West Virginia Board of Education* v. *Barnette*, 319 U. S., at 642.

There is, however, a more fundamental flaw in the plurality's analysis. This Court has recognized that natural persons enjoy negative free speech rights because of their interest in self-expression; an individual's right not to speak or to associate with the speech of others is a component of the broader constitutional interest of natural persons in freedom of conscience. Thus, in *Barnette, supra,* this Court struck down a compulsory flag salute statute to protect "the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Id.*, at 642. Similarly, in *Wooley* v. *Maynard*, 430 U. S. 705 (1977), the Court invalidated a statute requiring an official slogan to be displayed on all license plates to protect the individual interest in "freedom of mind." *Id.*, at 714. See also *Abood* v. *Detroit Board of Education*, 431 U. S. 209, 234–235 (1977). Most recently, in *Harper & Row Publishers, Inc.* v. *Nation Enterprises*, 471 U. S. 524 (1985), this Court rejected a public figure exception to the copyright law, reasoning that the protection of an author's profit incentive furthers rather than inhibits expression, *id.*, at 555–559, and that an author has a countervailing First Amendment interest in "*freedom of thought* and expression [that] 'includes both the right to speak freely and the right to refrain from speaking at all.'" *Id.*, at 559 (emphasis added), quoting *Wooley* v. *Maynard*, *supra*, at 714.

In *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974), the Court extended negative free speech rights to newspapers without much discussion. The Court stated that the right-of-reply statute not only deterred affirmative speech, but also "fail[ed] to clear the barriers of the First Amendment because of its intrusion into the function of editors." *Id.*, at 258. The Court explained that interference with "the exercise of editorial control and judgment" creates a peril for the liberty of the press like government control over "'what is to go into a newspaper.'" *Ibid.*, and n. 24, quoting 2 Z. Chafee, Government and Mass Communications 633 (1947). The Court did not elaborate further on the justification for its holding.

Extension of the individual freedom of conscience decisions to business corporations strains the rationale of those cases beyond the breaking point. To ascribe to such artificial entities an "intellect" or "mind" for freedom of conscience purposes is to confuse metaphor with reality. Corporations generally have not played the historic role of newspapers as conveyers of individual ideas and opinion. In extending positive free speech rights to corporations, this Court drew a distinction between the First Amendment rights of corporations and those of natural persons. See *First National Bank of Boston* v. *Bellotti*, 435 U. S., at 776; *Consolidated Edison Co.* v. *Public Service Comm'n of N. Y.*, 447 U. S. 530, 534–535, and n. 2 (1980). It recognized that corporate free speech rights do not arise because corporations, like individuals, have any interest in self-expression. See *Bellotti*, *supra*, at 777, and n. 12; *Consolidated Edison*, *supra*, at 534, n. 2. It held instead that such rights are recognized as an instrumental means of furthering the First Amendment purpose of fostering a broad forum of information to facilitate self-government. See *Bellotti*, *supra*, at 783; *Consolidated Edison*, *supra*, at 533.

The interest in remaining isolated from the expressive activity of others, and in declining to communicate at all, is for the most part divorced from this "broad public forum" purpose of the First Amendment. The right of access here constitutes an effort to facilitate and enlarge public discussion; it therefore furthers rather than abridges First Amendment values. See *Harper & Row Publishers, Inc.* v. *Nation Enterprises*, *supra*, at 558; *Buckley* v. *Valeo*, 424 U. S., at 92–93. In *Zauderer* v. *Office of Disciplinary Counsel*, 471 U. S. 626 (1985), this Court held that "[b]ecause the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, . . . [the] constitutionally protected interest in *not* providing any particular factual information in [a business'] advertising is minimal." *Id.*, at 651 (citation omitted). Likewise, because the interest on which the constitutional protection of corporate speech rests is the societal interest in receiving information and ideas, the constitutional interest of a corporation in not permitting the presentation of other distinct views clearly identified as those of the speaker is *de minimis*. This is especially true in the case of PG&E, which is after all a regulated public utility. Any claim it may have had to a sphere of corporate autonomy was largely surrendered to extensive regulatory authority when it was granted legal monopoly status.

This argument is bolstered by the fact that the two constitutional liberties most closely analogous to the right to refrain from speaking—the Fifth Amendment right to remain silent and the constitutional right of privacy—have been denied to corporations based on their corporate status. The Court in *Bellotti* recognized that some "'purely personal' guarantees . . . are unavailable to corporations and other organizations," 435 U. S., at 779, n. 14, and therefore declined to hold that "corporations have the full measure of rights that individuals enjoy under the First Amendment." *Id.*, at 777.[3]

III

PG&E is not an individual or a newspaper publisher; it is a regulated utility. The insistence on treating identically for constitutional purposes entities that are demonstrably different is as great a jurisprudential sin as treating differently those entities which are the same. Because I think this case is governed by *PruneYard*, and not by *Tornillo* or *Wooley*, I would affirm the judgment of the Supreme Court of California.

JUSTICE STEVENS, dissenting.

Because the plurality opinion is largely concerned with questions that need not be answered in order to decide this case,[1] I believe it is important to identify the actual issue with some care. The narrow question we must address is whether a state public utility commission may require the fundraising solicitation of a consumer advocacy group to be carried in a utility billing envelope. Since the utility concedes that *it* has no right to use the extra space in the billing envelope for its own newsletter, the question is limited to whether the Commission's requirement that it be the courier for the message of a third party violates the First Amendment. In my view, this requirement differs little from regulations applied daily to a variety of commercial communications that have rarely been challenged—and to my knowledge never invalidated—on First Amendment grounds.

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[3] The extension of negative free speech rights to corporations would cast doubt upon the result in *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367 (1969), as well as the suggestion in *Hudgens* v. *NLRB*, 424 U. S. 507 (1976), that the Federal Government may grant employees a right of access to employer property for the purpose of picketing, even though the First Amendment does not guarantee such access. *Id.*, at 521–523.

[1] For the plurality, the question in this case is whether a public utility commission "may require a privately owned utility company to include in its billing envelopes speech of a third party with which the utility disagrees." *Ante*, at 4. The plurality seems concerned that the California Public Utilities Commission's decision may be the harbinger of future decisions requiring publicly regulated institutions to bear banners antithetical to their own self-interest. Henceforth, a company's buildings and vehicles might display signs and stickers proclaiming the benefits of conservation, lower rates, and perhaps even government ownership. See *ante*, at 6–7, n. 4.

I

As the California Public Utilities Commission summarized its own ruling: "[T]his decision . . . grants, in modified form, the complaint of Toward Utility Rate Normalization (TURN) proposing access to the extra space in Pacific Gas and Electric Company's (PG&E) billing envelope by consumer representative organizations for the purpose of soliciting funds to be used for residential ratepayer representation in proceedings of this Commission involving PG&E." App. to Juris. Statement A–1. Accord, *id.*, at A–4.[2] The Commission did not select among competing advocacy groups yearning to reach residential ratepayers through the billing envelope; "no other ratepayer organizations . . . sought access to the extra space." *Id.*, at A–24.

In my view the propagandizing and sloganeering feared by the plurality is not authorized by paragraph 5(b) of the Commission's order, which provides that "PG&E and TURN shall each determine the content of [its] own material." *Id.*, at A–32. In context, it is clear that the limited editorial license afforded by that provision is confined to "a billing envelope extra space insert . . . which (1) explains the program, (2) sets forth a list of pending and anticipated PG&E applications and other cases likely to have a significant effect on customers' rates and services, and (3) invites voluntary donations to support advocacy by [TURN] on behalf of PG&E's residential customers before the Commission. The insert would also include a return envelope for mailing donations to a central collection point for transmittal to [TURN]." *Id.*, at A–4, A–5. It is unrealistic to suppose that the Commission, after adopting a program so detailed as to prescribe the subject matter of the communication and even to require return envelopes, can be thought to have sanctioned the freewheeling political debate the plurality opinion presupposes. Far from creating the postal equivalent of the soapbox in the park, the Commission "order[ed] that proposal 3" of the "Consumer Advocacy Checkoff" alternatives listed in TURN's complaint "be implemented." *Id.*, at A–17. Accord, *id.*, at A–31. That proposal, in marked contrast to the typically broad prayers for relief found in most complaints, limited the requested insert to the three matters described above, see *id.*, at A–78, and even provided a full illustrative insert as an exhibit, see *id.*, at A–85, A–86. Simply as a matter of construing a decision by a regulatory agency I find it difficult to understand the plurality's preference for discussing issues in their most abstract form. And as a matter of constitutional law there is surely no warrant for presuming that the Commission acted indiscriminately, insensitively, and without regard to the First Amendment questions raised by its access requirement. If any presumption is invoked, it should be that in favor of the regularity and constitutionality of governmental action, and the Commission's order should be construed narrowly as a consequence.

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[2] The Commission's access order is plainly limited to TURN's fundraising appeal: Subsections (f) through (i) of paragraph 5 of the order, which make provision for funds received in response to TURN's solicitation, make no sense if TURN is not required to solicit funds. See App. to Juris. Statement A–32, A–33.

That the Commission is serious about this limitation is borne out by its denial of access to a group which did not itself wish to participate in Commission proceedings and which failed to allege that its use of the billing envelope would enhance consumer participation in Commission proceedings. See *ante*, at 7, n. 5.

II

I assume that the plurality would not object to a utility commission rule dictating the format of the bill, even as to required warnings and the type size of various provisos and disclaimers.[3] Such regulation is not too different from that applicable to credit card bills, loan forms, and media advertising. See, *e. g.*, 15 U. S. C. §§1632(a), 1663; 12 CFR §§226.6–226.8, 226.10 (1985).[4] I assume also the plurality would permit the Commission to require the utility to disseminate legal notices of public hearings and ratemaking proceedings written by it. See *ante*, at 15–16, n. 12 (attempting to distinguish legal notices).[5] These compelled statements differ little from mandating disclosure of information in the bill itself, as the plurality recognizes.[6]

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[3] Since 1919 the predecessor to the California Public Utilities Commission ordered that each electric bill reprint the regulations "regarding payment of bills, disputed bills and discontinuance of service." *Pacific Gas & Electric Co.*, 17 Decisions of the Railroad Comm'n 143, 147 (1919). Other States have similar requirements.

[4] "Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, *SEC* v. *Texas Gulf Sulphur Co.*, 401 F. 2d 833 (CA2 1968), cert. denied, 394 U. S. 976 (1969), corporate proxy statements, *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375 (1970), [and] the exchange of price and production information among competitors, *American Column & Lumber Co.* v. *United States*, 257 U. S. 377 (1921)." *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978).

[5] At various times the Commission has required that inserts be placed in billing envelopes to "explai[n] the reasons behind [a] gas rate increase," *Pacific Gas & Electric Co.*, 9 P. U. C. 2d 82, 94 (1982), and to "describ[e] the components of the utility's costs," *San Diego Gas & Electric Co.*, 8 P. U. C. 2d 410 (1982). See *Pacific Gas & Electric Co.*, 7 P. U. C. 2d 349, 518 (1981) ("By March 1, 1982, PG&E shall mail to all its customers a bill insert which describes the components of the utility's costs. The complete bill insert to be sent is given in Appendix G of this decision. Its size and form shall be approved by the Executive Director in writing prior to inclusion with any customer's bill").

California has also enacted legislation requiring that utilities notify their customers of rate increases. These notices, which by statute must be included in utility bill envelopes, "shall state the amount of the proposed increase expressed in both dollar and percentage terms, a brief statement of the reasons the increase is required or sought, and the mailing address of the commission to which any customer inquiries relative to the proposed increase . . . may be directed." Cal. Public Utilities Code Ann. §454(a) (West 1975). Other States likewise require certain service-related communications to be carried in a utility company's billing envelope.

Given that the Commission can require the utility to make certain statements and to carry the Commission's own messages to its customers, it seems but a small step to acknowledge that the Commission can also require the utility to act as the conduit for a public interest group's message that bears a close relationship to the purpose of the billing envelope.[7] An analog to this requirement appears in securities law: the Securities and Exchange Commission requires the incumbent board of directors to transmit proposals of dissident shareholders which it opposes.[8] Presumably the plurality does not doubt the constitutionality of the SEC's requirement under the First Amendment, and yet—although the analogy is far from perfect—it performs the same function as the Commission's rule by making accessible the relevant audience, whether it be shareholders investing in the corporation or consumers served by the utility, to individuals or groups with demonstrable interests in reaching that audience for certain limited and approved purposes.

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[6] See *ante*, at 18 (the result in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974), would not differ if the forced reply had appeared in a separate insert rather in the newspaper proper). See also *ante*, at 11, n. 7.

[7] Because TURN's purpose is to solicit funds to fight utility rate increases, the success of its appeal bears directly on the size of the bill which, after all, the billing envelope contains.

[8] 17 CFR § 240.14a–8 (1985). This regulation cannot be justified on the basis of the commercial character of the communication, because the Rule can and has been used to propagate purely political proposals. See, *e. g., Medical Committee for Human Rights* v. *SEC*, 139 U. S. App. D. C. 226, 229, 432 F. 2d 659, 662 (1970) (shareholder proposal to stop sale of napalm in part because of use in Vietnam), vacated as moot, 401 U. S. 973 (1971). See generally Weiss, Proxy Voting on Social Issues: A Growth Industry, Bus. and Soc'y Rev. 16 (Autumn 1974).

Even if the SEC Rule were justified largely on the basis of the commercial character of the communication, that justification is not irrelevant in this case. The messages that the utility disseminates in its newsletter are unquestionably intended to advance the corporation's commercial interests, and its objections to the public interest group's messages are based on their potentially adverse impact on the utility's ability to obtain rate increases. These commercial factors do not justify an abridgment of the utility's constitutionally protected right to communicate in *its* newsletter, but they do provide a legitimate and an adequate justification for the Commission's action in giving TURN access to the same audience that receives the utility's newsletter.

If the California Public Utilities Commission had taken over company buildings and vehicles for propaganda purposes, or even engaged in viewpoint discrimination among speakers desirous of sending messages via the billing envelope, I would be concerned. But nothing in this case presents problems even remotely resembling or portending the ones just mentioned. Although the plurality's holding may wisely forestall serious constitutional problems that are likely to arise in the future, I am not convinced that the order under review today has crossed the threshold of unconstitutionality. Accordingly, I respectfully dissent.

CITY OF RENTON ET AL. *v.* PLAYTIME THEATRES, INC., ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84–1360. Argued November 12, 1985—Decided February 25, 1986

Respondents purchased two theaters in Renton, Washington, with the intention of exhibiting adult films and, at about the same time, filed suit in Federal District Court, seeking injunctive relief and a declaratory judgment that the First and Fourteenth Amendments were violated by a city ordinance that prohibits adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. The District Court ultimately entered summary judgment in the city's favor, holding that the ordinance did not violate the First Amendment. The Court of Appeals reversed, holding that the ordinance constituted a substantial restriction on First Amendment interests, and remanded the case for reconsideration as to whether the city had substantial governmental interests to support the ordinance.

Held: The ordinance is a valid governmental response to the serious problems created by adult theaters and satisfies the dictates of the First Amendment. Cf. *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50. Pp. 46–55.

(a) Since the ordinance does not ban adult theaters altogether, it is properly analyzed as a form of time, place, and manner regulation. "Content-neutral" time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. Pp. 46–47.

(b) The District Court found that the Renton City Council's "predominate" concerns were with the secondary effects of adult theaters on the surrounding community, not with the content of adult films themselves. This finding is more than adequate to establish that the city's pursuit of its zoning interests was unrelated to the suppression of free expression, and thus the ordinance is a "content-neutral" speech regulation. Pp. 47–50.

(c) The Renton ordinance is designed to serve a substantial governmental interest while allowing for reasonable alternative avenues of communication. A city's interest in attempting to preserve the quality of urban life, as here, must be accorded high respect. Although the ordinance was enacted without the benefit of studies specifically relating to

Renton's particular problems, Renton was entitled to rely on the experiences of, and studies produced by, the nearby city of Seattle and other cities. Nor was there any constitutional defect in the method chosen by Renton to further its substantial interests. Cities may regulate adult theaters by dispersing them, or by effectively concentrating them, as in Renton. Moreover, the ordinance is not "underinclusive" for failing to regulate other kinds of adult businesses, since there was no evidence that, at the time the ordinance was enacted, any other adult business was located in, or was contemplating moving into, Renton. Pp. 50–53.

(d) As required by the First Amendment, the ordinance allows for reasonable alternative avenues of communication. Although respondents argue that in general there are no "commercially viable" adult theater sites within the limited area of land left open for such theaters by the ordinance, the fact that respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a violation of the First Amendment, which does not compel the Government to ensure that adult theaters, or any other kinds of speech-related businesses, will be able to obtain sites at bargain prices. Pp. 53–54.

748 F. 2d 527, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., concurred in the result. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 55.

E. Barrett Prettyman, Jr., argued the cause for appellants. With him on the briefs were *David W. Burgett*, *Lawrence J. Warren*, *Daniel Kellogg*, *Mark E. Barber*, and *Zanetta L. Fontes*.

Jack R. Burns argued the cause for appellees. With him on the briefs was *Robert E. Smith*.*

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*Briefs of *amici curiae* urging reversal were filed for Jackson County, Missouri, by *Russell D. Jacobson;* for the Freedom Council Foundation by *Wendell R. Bird* and *Robert K. Skolrood;* for the National Institute of Municipal Law Officers by *George Agnost*, *Roy D. Bates*, *Benjamin L. Brown*, *J. Lamar Shelley*, *John W. Witt*, *Roger F. Cutler*, *Robert J. Alfton*, *James K. Baker*, *Barbara Mather*, *James D. Montgomery*, *Clifford D. Pierce, Jr.*, *William H. Taube*, *William I. Thornton, Jr.*, and *Charles S. Rhyne;* and for the National League of Cities et al. by *Benna*

JUSTICE REHNQUIST delivered the opinion of the Court.

This case involves a constitutional challenge to a zoning ordinance, enacted by appellant city of Renton, Washington, that prohibits adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. Appellees, Playtime Theatres, Inc., and Sea-First Properties, Inc., filed an action in the United States District Court for the Western District of Washington seeking a declaratory judgment that the Renton ordinance violated the First and Fourteenth Amendments and a permanent injunction against its enforcement. The District Court ruled in favor of Renton and denied the permanent injunction, but the Court of Appeals for the Ninth Circuit reversed and remanded for reconsideration. 748 F. 2d 527 (1984). We noted probable jurisdiction, 471 U. S. 1013 (1985), and now reverse the judgment of the Ninth Circuit.[1]

Ruth Solomon, Joyce Holmes Benjamin, Beate Bloch, and *Lawrence R. Velvel.*

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *David Utevsky, Jack D. Novik,* and *Burt Neuborne;* and for the American Booksellers Association, Inc., et al. by *Michael A. Bamberger.*

Eric M. Rubin and *Walter E. Diercks* filed a brief for the Outdoor Advertising Association of America, Inc., et al. as *amici curiae.*

[1] This appeal was taken under 28 U. S. C. § 1254(2), which provides this Court with appellate jurisdiction at the behest of a party relying on a state statute or local ordinance held unconstitutional by a court of appeals. As we have previously noted, there is some question whether jurisdiction under § 1254(2) is available to review a nonfinal judgment. See *South Carolina Electric & Gas Co.* v. *Flemming,* 351 U. S. 901 (1956); *Slaker* v. *O'Connor,* 278 U. S. 188 (1929). But see *Chicago* v. *Atchison, T. & S. F. R. Co.,* 357 U. S. 77, 82–83 (1958).

The present appeal seeks review of a judgment remanding the case to the District Court. We need not resolve whether this appeal is proper under § 1254(2), however, because in any event we have certiorari jurisdiction under 28 U. S. C. § 2103. As we have previously done in equiva-

In May 1980, the Mayor of Renton, a city of approximately 32,000 people located just south of Seattle, suggested to the Renton City Council that it consider the advisability of enacting zoning legislation dealing with adult entertainment uses. No such uses existed in the city at that time. Upon the Mayor's suggestion, the City Council referred the matter to the city's Planning and Development Committee. The Committee held public hearings, reviewed the experiences of Seattle and other cities, and received a report from the City Attorney's Office advising as to developments in other cities. The City Council, meanwhile, adopted Resolution No. 2368, which imposed a moratorium on the licensing of "any business . . . which . . . has as its primary purpose the selling, renting or showing of sexually explicit materials." App. 43. The resolution contained a clause explaining that such businesses "would have a severe impact upon surrounding businesses and residences." *Id.*, at 42.

In April 1981, acting on the basis of the Planning and Development Committee's recommendation, the City Council enacted Ordinance No. 3526. The ordinance prohibited any "adult motion picture theater" from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, or park, and within one mile of any school. App. to Juris. Statement 79a. The term "adult motion picture theater" was defined as "[a]n enclosed building used for presenting motion picture films, video cassettes, cable television, or any other such visual media, distinguished or characteri[zed] by an emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas' . . . for observation by patrons therein." *Id.*, at 78a.

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lent situations, see *El Paso* v. *Simmons*, 379 U. S. 497, 502–503 (1965); *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 927 (1975), we dismiss the appeal and, treating the papers as a petition for certiorari, grant the writ of certiorari. Henceforth, we shall refer to the parties as "petitioners" and "respondents."

In early 1982, respondents acquired two existing theaters in downtown Renton, with the intention of using them to exhibit feature-length adult films. The theaters were located within the area proscribed by Ordinance No. 3526. At about the same time, respondents filed the previously mentioned lawsuit challenging the ordinance on First and Fourteenth Amendment grounds, and seeking declaratory and injunctive relief. While the federal action was pending, the City Council amended the ordinance in several respects, adding a statement of reasons for its enactment and reducing the minimum distance from any school to 1,000 feet.

In November 1982, the Federal Magistrate to whom respondents' action had been referred recommended the entry of a preliminary injunction against enforcement of the Renton ordinance and the denial of Renton's motions to dismiss and for summary judgment. The District Court adopted the Magistrate's recommendations and entered the preliminary injunction, and respondents began showing adult films at their two theaters in Renton. Shortly thereafter, the parties agreed to submit the case for a final decision on whether a permanent injunction should issue on the basis of the record as already developed.

The District Court then vacated the preliminary injunction, denied respondents' requested permanent injunction, and entered summary judgment in favor of Renton. The court found that the Renton ordinance did not substantially restrict First Amendment interests, that Renton was not required to show specific adverse impact on Renton from the operation of adult theaters but could rely on the experiences of other cities, that the purposes of the ordinance were unrelated to the suppression of speech, and that the restrictions on speech imposed by the ordinance were no greater than necessary to further the governmental interests involved. Relying on *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50 (1976), and *United States* v. *O'Brien*, 391 U. S. 367 (1968), the court held that the Renton ordinance did not violate the First Amendment.

The Court of Appeals for the Ninth Circuit reversed. The Court of Appeals first concluded, contrary to the finding of the District Court, that the Renton ordinance constituted a substantial restriction on First Amendment interests. Then, using the standards set forth in *United States* v. *O'Brien*, *supra*, the Court of Appeals held that Renton had improperly relied on the experiences of other cities in lieu of evidence about the effects of adult theaters on Renton, that Renton had thus failed to establish adequately the existence of a substantial governmental interest in support of its ordinance, and that in any event Renton's asserted interests had not been shown to be unrelated to the suppression of expression. The Court of Appeals remanded the case to the District Court for reconsideration of Renton's asserted interests.

In our view, the resolution of this case is largely dictated by our decision in *Young* v. *American Mini Theatres, Inc.*, *supra*. There, although five Members of the Court did not agree on a single rationale for the decision, we held that the city of Detroit's zoning ordinance, which prohibited locating an adult theater within 1,000 feet of any two other "regulated uses" or within 500 feet of any residential zone, did not violate the First and Fourteenth Amendments. *Id.*, at 72–73 (plurality opinion of STEVENS, J., joined by BURGER, C. J., and WHITE and REHNQUIST, JJ.); *id.*, at 84 (POWELL, J., concurring). The Renton ordinance, like the one in *American Mini Theatres*, does not ban adult theaters altogether, but merely provides that such theaters may not be located within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. The ordinance is therefore properly analyzed as a form of time, place, and manner regulation. *Id.*, at 63, and n. 18; *id.*, at 78–79 (POWELL, J., concurring).

Describing the ordinance as a time, place, and manner regulation is, of course, only the first step in our inquiry. This Court has long held that regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment. See *Carey* v. *Brown*, 447 U. S. 455, 462–463, and n. 7 (1980); *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 95, 98–99 (1972). On the other hand, so-called "content-neutral" time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. See *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984); *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 807 (1984); *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U. S. 640, 647–648 (1981).

At first glance, the Renton ordinance, like the ordinance in *American Mini Theatres*, does not appear to fit neatly into either the "content-based" or the "content-neutral" category. To be sure, the ordinance treats theaters that specialize in adult films differently from other kinds of theaters. Nevertheless, as the District Court concluded, the Renton ordinance is aimed not at the *content* of the films shown at "adult motion picture theatres," but rather at the *secondary effects* of such theaters on the surrounding community. The District Court found that the City Council's "*predominate* concerns" were with the secondary effects of adult theaters, and not with the content of adult films themselves. App. to Juris. Statement 31a (emphasis added). But the Court of Appeals, relying on its decision in *Tovar* v. *Billmeyer*, 721 F. 2d 1260, 1266 (CA9 1983), held that this was not enough to sustain the ordinance. According to the Court of Appeals, if "*a motivating factor*" in enacting the ordinance was to restrict respondents' exercise of First Amendment rights the ordinance would be invalid, apparently no matter how small a part this motivating factor may have played in the City Council's decision. 748 F. 2d, at 537 (emphasis in original). This view of the law was rejected in *United States* v. *O'Brien*, 391 U. S., at 382–386, the very case that the Court of Appeals said it was applying:

> "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. . . .
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> . . . . .
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> ". . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork." *Id.*, at 383–384.

The District Court's finding as to "predominate" intent, left undisturbed by the Court of Appeals, is more than adequate to establish that the city's pursuit of its zoning interests here was unrelated to the suppression of free expression. The ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally "protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life," not to suppress the expression of unpopular views. See App. to Juris. Statement 90a. As JUSTICE POWELL observed in *American Mini Theatres*, "[i]f [the city] had been concerned with restricting the message purveyed by adult theaters, it would have tried to close them or restrict their number rather than circumscribe their choice as to location." 427 U. S., at 82, n. 4.

In short, the Renton ordinance is completely consistent with our definition of "content-neutral" speech regulations as those that "are *justified* without reference to the content of the regulated speech." *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 771 (1976) (emphasis added); *Community for Creative Non-Violence, supra*, at 293; *International Society for Krishna Consciousness, supra*, at 648. The ordinance does not contravene the fundamental principle that underlies our concern about "content-based" speech regulations: that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Mosley, supra,* at 95–96.

It was with this understanding in mind that, in *American Mini Theatres*, a majority of this Court decided that, at least with respect to businesses that purvey sexually explicit materials,[2] zoning ordinances designed to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to "content-neutral" time, place, and manner regulations. JUSTICE STEVENS, writing for the plurality, concluded that the city of Detroit was entitled to draw a distinction between adult theaters and other kinds of theaters "without violating the government's paramount obligation of neutrality in its regulation of protected communication," 427 U. S., at 70, noting that "[i]t is th[e] secondary effect which these zoning ordinances attempt to avoid, not the dissemination of 'offensive' speech," *id.*, at 71, n. 34. JUSTICE POWELL, in concurrence, elaborated:

> "[The] dissent misconceives the issue in this case by insisting that it involves an impermissible time, place, and manner restriction based on the content of expression. It involves nothing of the kind. We have here merely a decision by the city to treat certain movie theaters differently because they have markedly different effects upon their surroundings. . . . Moreover, even if this were a case involving a special governmental response to the content of one type of movie, it is possible that the result would be supported by a line of cases recognizing that the government can tailor its reaction to different types of speech according to the degree to which its special and overriding interests are implicated.

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[2] See *American Mini Theatres*, 427 U. S., at 70 (plurality opinion) ("[I]t is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate . . .").

> See, *e. g., Tinker* v. *Des Moines School Dist.*, 393 U. S. 503, 509–511 (1969); *Procunier* v. *Martinez*, 416 U. S. 396, 413–414 (1974); *Greer* v. *Spock*, 424 U. S. 828, 842–844 (1976) (POWELL, J., concurring); cf. *CSC* v. *Letter Carriers*, 413 U. S. 548 (1973)." *Id.*, at 82, n. 6.

The appropriate inquiry in this case, then, is whether the Renton ordinance is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication. See *Community for Creative Non-Violence*, 468 U. S., at 293; *International Society for Krishna Consciousness*, 452 U. S., at 649, 654. It is clear that the ordinance meets such a standard. As a majority of this Court recognized in *American Mini Theatres*, a city's "interest in attempting to preserve the quality of urban life is one that must be accorded high respect." 427 U. S., at 71 (plurality opinion); see *id.*, at 80 (POWELL, J., concurring) ("Nor is there doubt that the interests furthered by this ordinance are both important and substantial"). Exactly the same vital governmental interests are at stake here.

The Court of Appeals ruled, however, that because the Renton ordinance was enacted without the benefit of studies specifically relating to "the particular problems or needs of Renton," the city's justifications for the ordinance were "conclusory and speculative." 748 F. 2d, at 537. We think the Court of Appeals imposed on the city an unnecessarily rigid burden of proof. The record in this case reveals that Renton relied heavily on the experience of, and studies produced by, the city of Seattle. In Seattle, as in Renton, the adult theater zoning ordinance was aimed at preventing the secondary effects caused by the presence of even one such theater in a given neighborhood. See *Northend Cinema, Inc.* v. *Seattle*, 90 Wash. 2d 709, 585 P. 2d 1153 (1978). The opinion of the Supreme Court of Washington in *Northend Cinema*, which was before the Renton City Council when it enacted the ordinance in question here, described Seattle's experience as follows:

> "The amendments to the City's zoning code which are at issue here are the culmination of a long period of study and discussion of the problems of adult movie theaters in residential areas of the City. . . . [T]he City's Department of Community Development made a study of the need for zoning controls of adult theaters . . . . The study analyzed the City's zoning scheme, comprehensive plan, and land uses around existing adult motion picture theaters. . . ." *Id.*, at 711, 585 P. 2d, at 1155.
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> "[T]he [trial] court heard extensive testimony regarding the history and purpose of these ordinances. It heard expert testimony on the adverse effects of the presence of adult motion picture theaters on neighborhood children and community improvement efforts. The court's detailed findings, which include a finding that the location of adult theaters has a harmful effect on the area and contribute to neighborhood blight, are supported by substantial evidence in the record." *Id.*, at 713, 585 P. 2d, at 1156.
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> "The record is replete with testimony regarding the effects of adult movie theater locations on residential neighborhoods." *Id.*, at 719, 585 P. 2d, at 1159.

We hold that Renton was entitled to rely on the experiences of Seattle and other cities, and in particular on the "detailed findings" summarized in the Washington Supreme Court's *Northend Cinema* opinion, in enacting its adult theater zoning ordinance. The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses. That was the case here. Nor is our holding affected by the fact that Seattle ultimately chose a different method of adult theater zoning than that chosen by Renton, since Seattle's choice of a different remedy to combat the secondary effects of adult theaters does not call into question either Seattle's identification of those secondary effects or the relevance of Seattle's experience to Renton.

We also find no constitutional defect in the method chosen by Renton to further its substantial interests. Cities may regulate adult theaters by dispersing them, as in Detroit, or by effectively concentrating them, as in Renton. "It is not our function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same areas. . . . [T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *American Mini Theatres*, 427 U. S., at 71 (plurality opinion). Moreover, the Renton ordinance is "narrowly tailored" to affect only that category of theaters shown to produce the unwanted secondary effects, thus avoiding the flaw that proved fatal to the regulations in *Schad* v. *Mount Ephraim*, 452 U. S. 61 (1981), and *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205 (1975).

Respondents contend that the Renton ordinance is "underinclusive," in that it fails to regulate other kinds of adult businesses that are likely to produce secondary effects similar to those produced by adult theaters. On this record the contention must fail. There is no evidence that, at the time the Renton ordinance was enacted, any other adult business was located in, or was contemplating moving into, Renton. In fact, Resolution No. 2368, enacted in October 1980, states that "the City of Renton does not, at the present time, have any business whose primary purpose is the sale, rental, or showing of sexually explicit materials." App. 42. That Renton chose first to address the potential problems created by one particular kind of adult business in no way suggests that the city has "singled out" adult theaters for discriminatory treatment. We simply have no basis on this record for assuming that Renton will not, in the future, amend its ordinance to include other kinds of adult businesses that have been shown to produce the same kinds of secondary effects as adult theaters. See *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488–489 (1955).

Finally, turning to the question whether the Renton ordinance allows for reasonable alternative avenues of communication, we note that the ordinance leaves some 520 acres, or more than five percent of the entire land area of Renton, open to use as adult theater sites. The District Court found, and the Court of Appeals did not dispute the finding, that the 520 acres of land consists of "[a]mple, accessible real estate," including "acreage in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space that is criss-crossed by freeways, highways, and roads." App. to Juris. Statement 28a.

Respondents argue, however, that some of the land in question is already occupied by existing businesses, that "practically none" of the undeveloped land is currently for sale or lease, and that in general there are no "commercially viable" adult theater sites within the 520 acres left open by the Renton ordinance. Brief for Appellees 34–37. The Court of Appeals accepted these arguments,[3] concluded that the 520 acres was not truly "available" land, and therefore held that the Renton ordinance "would result in a substantial restriction" on speech. 748 F. 2d, at 534.

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[3] The Court of Appeals' rejection of the District Court's findings on this issue may have stemmed in part from the belief, expressed elsewhere in the Court of Appeals' opinion, that, under *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485 (1984), appellate courts have a duty to review *de novo* all mixed findings of law and fact relevant to the application of First Amendment principles. See 748 F. 2d 527, 535 (1984). We need not review the correctness of the Court of Appeals' interpretation of *Bose Corp.*, since we determine that, under any standard of review, the District Court's findings should not have been disturbed.

We disagree with both the reasoning and the conclusion of the Court of Appeals. That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. And although we have cautioned against the enactment of zoning regulations that have "the effect of suppressing, or greatly restricting access to, lawful speech," *American Mini Theatres*, 427 U. S., at 71, n. 35 (plurality opinion), we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices. See *id.*, at 78 (POWELL, J., concurring) ("The inquiry for First Amendment purposes is not concerned with economic impact"). In our view, the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before us easily meets this requirement.

In sum, we find that the Renton ordinance represents a valid governmental response to the "admittedly serious problems" created by adult theaters. See *id.*, at 71 (plurality opinion). Renton has not used "the power to zone as a pretext for suppressing expression," *id.*, at 84 (POWELL, J., concurring), but rather has sought to make some areas available for adult theaters and their patrons, while at the same time preserving the quality of life in the community at large by preventing those theaters from locating in other areas. This, after all, is the essence of zoning. Here, as in *American Mini Theatres*, the city has enacted a zoning ordinance that meets these goals while also satisfying the dictates of the

First Amendment.[4] The judgment of the Court of Appeals is therefore

Reversed.

JUSTICE BLACKMUN concurs in the result.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Renton's zoning ordinance selectively imposes limitations on the location of a movie theater based exclusively on the content of the films shown there. The constitutionality of the ordinance is therefore not correctly analyzed under standards applied to content-neutral time, place, and manner restrictions. But even assuming that the ordinance may fairly be characterized as content neutral, it is plainly unconstitutional under the standards established by the decisions of this Court. Although the Court's analysis is limited to cases involving "businesses that purvey sexually explicit materials," *ante*, at 49, and n. 2, and thus does not affect our holdings in cases involving state regulation of other kinds of speech, I dissent.

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[4] Respondents argue, as an "alternative basis" for affirming the decision of the Court of Appeals, that the Renton ordinance violates their rights under the Equal Protection Clause of the Fourteenth Amendment. As should be apparent from our preceding discussion, respondents can fare no better under the Equal Protection Clause than under the First Amendment itself. See *Young* v. *American Mini Theatres, Inc.*, 427 U. S., at 63–73.

Respondents also argue that the Renton ordinance is unconstitutionally vague. More particularly, respondents challenge the ordinance's application to buildings "used" for presenting sexually explicit films, where the term "used" describes "a continuing course of conduct of exhibiting [sexually explicit films] in a manner which appeals to a prurient interest." App. to Juris. Statement 96a. We reject respondents' "vagueness" argument for the same reasons that led us to reject a similar challenge in *American Mini Theatres, supra.* There, the Detroit ordinance applied to theaters "used to present material distinguished or characterized by an emphasis on [sexually explicit matter]." *Id.*, at 53. We held that "even if there may be some uncertainty about the effect of the ordinances on other litigants, they are unquestionably applicable to these respondents." *Id.*, at 58–59. We also held that the Detroit ordinance created no "significant deterrent effect" that might justify invocation of the First Amendment "overbreadth" doctrine. *Id.*, at 59–61.

I

"[A] constitutionally permissible time, place, or manner restriction may not be based upon either the content or subject matter of speech." *Consolidated Edison Co.* v. *Public Service Comm'n of N. Y.*, 447 U. S. 530, 536 (1980). The Court asserts that the ordinance is "aimed not at the *content* of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theaters on the surrounding community," *ante*, at 47 (emphasis in original), and thus is simply a time, place, and manner regulation.[1] This analysis is misguided.

The fact that adult movie theaters may cause harmful "secondary" land-use effects may arguably give Renton a compelling reason to regulate such establishments; it does not mean, however, that such regulations are content neutral.

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[1] The Court apparently finds comfort in the fact that the ordinance does not "deny use to those wishing to express less favored or more controversial views." *Ante*, at 48–49. However, content-based discrimination is not rendered "any less odious" because it distinguishes "among entire classes of ideas, rather than among points of view within a particular class." *Lehman* v. *City of Shaker Heights*, 418 U. S. 298, 316 (1974) (BRENNAN, J., dissenting); see also *Consolidated Edison Co.* v. *Public Service Comm'n of N. Y.*, 447 U. S. 530, 537 (1980) ("The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic"). Moreover, the Court's conclusion that the restrictions imposed here were viewpoint neutral is patently flawed. "As a practical matter, the speech suppressed by restrictions such as those involved [here] will almost invariably carry an implicit, if not explicit, message in favor of more relaxed sexual mores. Such restrictions, in other words, have a potent viewpoint-differential impact. . . . To treat such restrictions as viewpoint-neutral seems simply to ignore reality." Stone, Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions, 46 U. Chi. L. Rev. 81, 111–112 (1978).

Because the ordinance imposes special restrictions on certain kinds of speech on the basis of *content,* I cannot simply accept, as the Court does, Renton's claim that the ordinance was not designed to suppress the content of adult movies. "[W]hen regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited 'merely because public officials disapprove the speaker's views.'" *Consolidated Edison Co., supra,* at 536 (quoting *Niemotko* v. *Maryland,* 340 U. S. 268, 282 (1951) (Frankfurter, J., concurring in result)). "[B]efore deferring to [Renton's] judgment, [we] must be convinced that the city is seriously and comprehensively addressing" secondary land-use effects associated with adult movie theaters. *Metromedia, Inc.* v. *San Diego,* 453 U. S. 490, 531 (1981) (BRENNAN, J., concurring in judgment). In this case, both the language of the ordinance and its dubious legislative history belie the Court's conclusion that "the city's pursuit of its zoning interests here was unrelated to the suppression of free expression." *Ante,* at 48.

A

The ordinance discriminates on its face against certain forms of speech based on content. Movie theaters specializing in "adult motion pictures" may not be located within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. Other motion picture theaters, and other forms of "adult entertainment," such as bars, massage parlors, and adult bookstores, are not subject to the same restrictions. This selective treatment strongly suggests that Renton was interested not in controlling the "secondary effects" associated with adult businesses, but in discriminating against adult theaters based on the content of the films they exhibit. The Court ignores this discriminatory treatment, declaring that Renton is free "to address the potential problems created by one particular kind of adult business," *ante,* at 52–53, and to amend the ordinance in the future to include other adult enterprises. *Ante*, at 53 (citing *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488–489 (1955)).[2] However, because of the First Amendment interests at stake here, this one-step-at-a-time analysis is wholly inappropriate.

> "This Court frequently has upheld underinclusive classifications on the sound theory that a legislature may deal with one part of a problem without addressing all of it. See *e. g.*, *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488–489 (1955). This presumption of statutory validity, however, has less force when a classification turns on the subject matter of expression. '[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.' *Police Dept. of Chicago* v. *Mosley*, 408 U. S., at 95." *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205, 215 (1975).

In this case, the city has not justified treating adult movie theaters differently from other adult entertainment businesses. The ordinance's underinclusiveness is cogent evidence that it was aimed at the *content* of the films shown in adult movie theaters.

B

Shortly *after* this lawsuit commenced, the Renton City Council amended the ordinance, adding a provision explaining that its intention in adopting the ordinance had been "to promote the City of Renton's great interest in protecting and preserving the quality of its neighborhoods, commercial districts, and the quality of urban life through effective land use planning." App. to Juris. Statement 81a. The amended ordinance also lists certain conclusory "findings" concerning adult entertainment land uses that the Council purportedly relied upon in adopting the ordinance. *Id.*, at 81a–86a. The city points to these provisions as evidence that the ordinance was designed to control the secondary effects associated with adult movie theaters, rather than to suppress the content of the films they exhibit. However, the "legislative history" of the ordinance strongly suggests otherwise.

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[2] The Court also explains that "[t]here is no evidence that, at the time the Renton ordinance was enacted, any other adult business was located in, or was contemplating moving into, Renton." *Ante*, at 52. However, at the time the ordinance was enacted, there was no evidence that any *adult movie theaters* were located in, or considering moving to, Renton. Thus, there was no legitimate reason for the city to treat adult movie theaters differently from other adult businesses.

Prior to the amendment, there was no indication that the ordinance was designed to address any "secondary effects" a single adult theater might create. In addition to the suspiciously coincidental timing of the amendment, many of the City Council's "findings" do not relate to legitimate land-use concerns. As the Court of Appeals observed, "[b]oth the magistrate and the district court recognized that many of the stated reasons for the ordinance were no more than expressions of dislike for the subject matter." 748 F. 2d 527, 537 (CA9 1984).[3] That some residents may be offended by the *content* of the films shown at adult movie theaters cannot form the basis for state regulation of speech. See *Terminiello* v. *Chicago*, 337 U. S. 1 (1949).

Some of the "findings" added by the City Council do relate to supposed "secondary effects" associated with adult movie theaters.[4] However, the Court cannot, as it does, merely accept these *post hoc* statements at face value. "[T]he presumption of validity that traditionally attends a local government's exercise of its zoning powers carries little, if any, weight where the zoning regulation trenches on rights of expression protected under the First Amendment." *Schad* v. *Mount Ephraim*, 452 U. S. 61, 77 (1981) (BLACKMUN, J., concurring). As the Court of Appeals concluded, "[t]he record presented by Renton to support its asserted interest in enacting the zoning ordinance is very thin." 748 F. 2d, at 536.

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[3] For example, "finding" number 2 states that

"[l]ocation of adult entertainment land uses on the main commercial thoroughfares of the City gives an impression of legitimacy to, and causes a loss of sensitivity to the adverse effect of pornography upon children, established family relations, respect for marital relationship and for the sanctity of marriage relations of others, and the concept of non-aggressive, consensual sexual relations." App. to Juris. Statement 86a.

"Finding" number 6 states that

"[l]ocation of adult land uses in close proximity to residential uses, churches, parks, and other public facilities, and schools, will cause a degradation of the community standard of morality. Pornographic material has a degrading effect upon the relationship between spouses." *Ibid.*

The amended ordinance states that its "findings" summarize testimony received by the City Council at certain public hearings. While none of this testimony was ever recorded or preserved, a city official reported that residents had objected to having adult movie theaters located in their community. However, the official was unable to recount any testimony as to how adult movie theaters would specifically affect the schools, churches, parks, or residences "protected" by the ordinance. See App. 190–192. The City Council conducted no studies, and heard no expert testimony, on how the protected uses would be affected by the presence of an adult movie theater, and never considered whether residents' concerns could be met by "restrictions that are less intrusive on protected forms of expression." *Schad*, *supra*, at 74. As a result, any "findings" regarding "secondary effects" caused by adult movie theaters, or the need to adopt specific locational requirements to combat such effects, were not "findings" at all, but purely speculative conclusions. Such "findings" were not such as are required to justify the burdens the ordinance imposed upon constitutionally protected expression.

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[4] For example, "finding" number 12 states that

"[l]ocation of adult entertainment land uses in proximity to residential uses, churches, parks and other public facilities, and schools, may lead to increased levels of criminal activities, including prostitution, rape, incest and assaults in the vicinity of such adult entertainment land uses." *Id.*, at 83a.

The Court holds that Renton was entitled to rely on the experiences of cities like Detroit and Seattle, which had enacted special zoning regulations for adult entertainment businesses after studying the adverse effects caused by such establishments. However, even assuming that Renton was concerned with the same problems as Seattle and Detroit, it never actually reviewed any of the studies conducted by those cities. Renton had no basis for determining if any of the "findings" made by these cities were relevant to *Renton's* problems or needs.[5] Moreover, since Renton ultimately adopted zoning regulations different from either Detroit or Seattle, these "studies" provide no basis for assessing the effectiveness of the particular restrictions adopted under the ordinance.[6] Renton cannot merely rely on the general ex-

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[5] As part of the amendment passed after this lawsuit commenced, the City Council added a statement that it had intended to rely on the Washington Supreme Court's opinion in *Northend Cinema, Inc.* v. *Seattle*, 90 Wash. 2d 709, 585 P. 2d 1153 (1978), cert. denied *sub nom. Apple Theatre, Inc.* v. *Seattle*, 441 U. S. 946 (1979), which upheld Seattle's zoning regulations against constitutional attack. Again, despite the suspicious coincidental timing of the amendment, the Court holds that "Renton was entitled to rely . . . on the 'detailed findings' summarized in the . . . *Northend Cinema* opinion." *Ante*, at 51. In *Northend Cinema*, the court noted that "[t]he record is replete with testimony regarding the effects of adult movie theater locations on residential neighborhoods." 90 Wash. 2d, at 719, 585 P. 2d, at 1159. The opinion however, does not explain the evidence it purports to summarize, and provides no basis for determining whether Seattle's experience is relevant to Renton's.

[6] As the Court of Appeals observed:

"Although the Renton ordinance *purports* to copy Detroit's and Seattle's, it does not solve the same problem in the same manner. The Detroit ordinance was intended to disperse adult theaters throughout the city so that no one district would deteriorate due to a concentration of such theaters. The Seattle ordinance, by contrast, was intended to *concentrate* the theaters in one place so that the whole city would not bear the effects of them. The Renton Ordinance is allegedly aimed at protecting certain uses—schools, parks, churches and residential areas—from the perceived periences of Seattle or Detroit, for it must "justify its ordinance in the context of *Renton's* problems—not Seattle's or Detroit's problems." 748 F. 2d, at 536 (emphasis in original).

In sum, the circumstances here strongly suggest that the ordinance was designed to suppress expression, even that constitutionally protected, and thus was not to be analyzed as a content-neutral time, place, and manner restriction. The Court allows Renton to conceal its illicit motives, however, by reliance on the fact that other communities adopted similar restrictions. The Court's approach largely immunizes such measures from judicial scrutiny, since a municipality can readily find other municipal ordinances to rely upon, thus always retrospectively justifying special zoning regulations for adult theaters.[7] Rather than speculate about Renton's motives for adopting such measures, our cases require the conclusion that the ordinance, like any other content-based restriction on speech, is constitutional "only if the [city] can show that [it] is a precisely drawn means of serving a compelling [governmental] interest." *Consolidated Edison Co.* v. *Public Service Comm'n of N. Y.*, 447 U. S., at 540; see also *Carey* v. *Brown*, 447 U. S. 455, 461–462 (1980); *Police Department of Chicago* v. *Mosley*, 408 U. S. 92, 99 (1972). Only this strict approach can insure that cities will not use their zoning powers as a pretext for suppressing constitutionally protected expression.

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unfavorable effects of an adult theater." 748 F. 2d, at 536 (emphasis in original).

[7] As one commentator has noted:

"[A]nyone with any knowledge of human nature should naturally assume that the decision to adopt almost any content-based restriction might have been affected by an antipathy on the part of at least some legislators to the ideas or information being suppressed. The logical assumption, in other words, is not that there is not improper motivation but, rather, because legislators are only human, that there is a substantial risk that an impermissible consideration has in fact colored the deliberative process." Stone, *supra* n. 1, at 106.

Applying this standard to the facts of this case, the ordinance is patently unconstitutional. Renton has not shown that locating adult movie theaters in proximity to its churches, schools, parks, and residences will necessarily result in undesirable "secondary effects," or that these problems could not be effectively addressed by less intrusive restrictions.

II

Even assuming that the ordinance should be treated like a content-neutral time, place, and manner restriction, I would still find it unconstitutional. "[R]estrictions of this kind are valid provided . . . that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984); *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U. S. 640, 648 (1981). In applying this standard, the Court "fails to subject the alleged interests of the [city] to the degree of scrutiny required to ensure that expressive activity protected by the First Amendment remains free of unnecessary limitations." *Community for Creative Non-Violence*, 468 U. S., at 301 (MARSHALL, J., dissenting). The Court "evidently [and wrongly] assumes that the balance struck by [Renton] officials is deserving of deference so long as it does not appear to be tainted by content discrimination." *Id.*, at 315. Under a *proper* application of the relevant standards, the ordinance is clearly unconstitutional.

A

The Court finds that the ordinance was designed to further Renton's substantial interest in "preserv[ing] the quality of urban life." *Ante*, at 50. As explained above, the record here is simply insufficient to support this assertion. The city made no showing as to how uses "protected" by the ordinance would be affected by the presence of an adult movie theater. Thus, the Renton ordinance is clearly distinguishable from the Detroit zoning ordinance upheld in *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50 (1976). The Detroit ordinance, which was designed to disperse adult theaters throughout the city, was supported by the testimony of urban planners and real estate experts regarding the adverse effects of locating several such businesses in the same neighborhood. *Id.*, at 55; see also *Northend Cinema, Inc.* v. *Seattle*, 90 Wash. 2d 709, 711, 585 P. 2d 1153, 1154–1155 (1978), cert. denied *sub nom. Apple Theatre, Inc.* v. *Seattle*, 441 U. S. 946 (1979) (Seattle zoning ordinance was the "culmination of a long period of study and discussion"). Here, the Renton Council was aware only that some residents had complained about adult movie theaters, and that other localities had adopted special zoning restrictions for such establishments. These are not "facts" sufficient to justify the burdens the ordinance imposed upon constitutionally protected expression.

B

Finally, the ordinance is invalid because it does not provide for reasonable alternative avenues of communication. The District Court found that the ordinance left 520 acres in Renton available for adult theater sites, an area comprising about five percent of the city. However, the Court of Appeals found that because much of this land was already occupied, "[l]imiting adult theater uses to these areas is a substantial restriction on speech." 748 F. 2d, at 534. Many "available" sites are also largely unsuited for use by movie theaters. See App. 231, 241. Again, these facts serve to distinguish this case from *American Mini Theatres*, where there was no indication that the Detroit zoning ordinance seriously limited the locations available for adult businesses. See *American Mini Theatres*, *supra*, at 71, n. 35 (plurality opinion) ("The situation would be quite different if the ordinance had the effect of . . . greatly restricting access to . . . lawful speech"); see also *Basiardanes* v. *City of Galveston*, 682 F. 2d 1203, 1214 (CA5 1982) (ordinance effectively banned adult theaters by restricting them to "'the most unattractive, inaccessible, and inconvenient areas of a city'"); *Purple Onion, Inc.* v. *Jackson,* 511 F. Supp. 1207, 1217 (ND Ga. 1981) (proposed sites for adult entertainment uses were either "unavailable, unusable, or so inaccessible to the public that . . . they amount to no locations").

Despite the evidence in the record, the Court reasons that the fact "[t]hat respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation." *Ante,* at 54. However, respondents are not on equal footing with other prospective purchasers and lessees, but must conduct business under severe restrictions not imposed upon other establishments. The Court also argues that the First Amendment does not compel "the government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices." *Ibid.* However, respondents do not ask Renton to guarantee low-price sites for their businesses, but seek only a reasonable opportunity to operate adult theaters in the city. By denying them this opportunity, Renton can effectively ban a form of protected speech from its borders. The ordinance "greatly restrict[s] access to . . . lawful speech," *American Mini Theatres, supra,* at 71, n. 35 (plurality opinion), and is plainly unconstitutional.

UNITED STATES *v.* MECHANIK ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 84-1640. Argued December 2, 1985—Decided February 25, 1986*

A federal grand jury returned an indictment charging respondents and cross-petitioners (hereafter defendants) with drug-related offenses and conspiracy, and later returned a superseding indictment expanding the conspiracy charge. Two law enforcement agents testified in tandem before the grand jury in support of the superseding indictment. The defendants did not learn about this until the second week of their trial when the Government furnished them with a transcript of the grand jury testimony. The defendants were found guilty after a jury trial, and the District Court denied their motion to dismiss the superseding indictment on the ground that the two agents' simultaneous presence before the grand jury violated Federal Rule of Criminal Procedure 6(d), which provides that only specified persons including "the witness under examination" may be present at a grand jury proceeding. The Court of Appeals reversed the conspiracy convictions and dismissed the conspiracy portion of the indictment, holding that although Rule 6(d) was violated, the violation tainted only that portion of the indictment.

Held: However diligent the defendants may have been in seeking to discover the basis for the claimed violation of Rule 6(d), the petit jury's guilty verdict rendered harmless any error in the grand jury's charging decision that may have flowed from the violation. In such case, the societal costs of retrial are far too substantial to justify setting aside the verdict simply because of an error in the grand jury proceeding. Pp. 69–73.

756 F. 2d 994, affirmed in part and reversed in part.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and STEVENS, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 73. O'CONNOR, J., filed an opinion concurring in the judgment, in which BRENNAN and BLACKMUN, JJ., joined, *post*, p. 73. MARSHALL, J., filed a dissenting opinion, *post*, p. 80.

Bruce J. Rosen argued the cause for petitioners in Nos. 84-1700 and 84-1704 and respondents in No. 84-1640.

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*Together with No. 84-1700, *Lill* v. *United States*, and No. 84-1704, *Mechanik* v. *United States*, also on certiorari to the same court.

With him on the briefs were *Michael D. Graves* and *Stephen J. Rogers.*

Mark I. Levy argued the cause for the United States. With him on the brief were *Acting Solicitor General Fried, Assistant Attorney General Trott, Deputy Solicitor General Frey,* and *Vincent L. Gambale.*

JUSTICE REHNQUIST delivered the opinion of the Court.

Federal Rule of Criminal Procedure 6(d) states that only specified persons including "the witness under examination" may be present at a grand jury proceeding. In these cases, two Government witnesses testified in tandem before the grand jury, which indicted respondents and cross-petitioners (hereafter defendants) Mechanik and Lill for various drug-related offenses and conspiracy to commit such offenses. The Court of Appeals for the Fourth Circuit held that the simultaneous presence of these two witnesses violated Rule 6(d), and that even though the petit jury subsequently returned a verdict of guilty against defendants, the verdict must be set aside on any count that corresponds to a "tainted" portion of the indictment. We believe that the petit jury's verdict of guilty beyond a reasonable doubt demonstrates *a fortiori* that there was probable cause to charge the defendants with the offenses for which they were convicted. Therefore, the convictions must stand despite the rule violation.

A fairly detailed summary of the District Court proceedings will help to illustrate the nature and extent of our holding. A grand jury returned an indictment charging defendants with drug-related offenses and conspiracy. This indictment was concededly free from any claim of error. The grand jury then returned a superseding indictment in which the conspiracy charge was expanded. In support of this superseding indictment, the United States Attorney presented the testimony of two law enforcement agents who were sworn together and questioned in tandem before the grand jury.

The defendants did not learn about this joint testimony until after trial began. Before trial, they filed an omnibus motion requesting, *inter alia*, the names of all the people who appeared before the grand jury. The Government responded that there were no unauthorized persons appearing before the grand jury, and the District Court denied the motion. Trial began in February 1980, and concluded in early July of the same year. During the second week of trial, one Jerry Rinehart, an agent of the Drug Enforcement Administration, testified as a Government witness. At the time of his testimony, the Government furnished the defendants with a portion of the transcript of his grand jury testimony as required by the Jencks Act, 18 U. S. C. § 3500. The transcript disclosed that Rinehart and his fellow agent, Randolph James, had testified in tandem before the grand jury.

The defendants moved for dismissal of the indictment on the ground that the simultaneous presence of the two agents had violated Federal Rule of Criminal Procedure 6(d). Chief Judge Knapp, presiding over the trial, concluded that the presence and testimony of the two agents had not violated Rule 6(d), and he denied the motion. In May 1980, however, Chief Judge Knapp was unexpectedly hospitalized, and Judge Copenhaver took over as the trial judge. The defendants then moved for a rehearing of their motion to dismiss the indictment. Judge Copenhaver took the motion under advisement until the conclusion of trial.

In August 1980, after the jury had returned its guilty verdict, Judge Copenhaver ruled upon and denied the defendants' motion for dismissal of the indictment. 511 F. Supp. 50 (SD W. Va. 1980). He first decided, contrary to Chief Judge Knapp's earlier ruling, that the joint testimony of Agents Rinehart and James *did* constitute a violation of Rule 6(d). *Id.*, at 53–58. But he declined to set aside the defendants' indictment and convictions because, on the basis of a comparison between the two indictments and the evidence on which the indictments rested, the violation of Rule 6(d) had not harmed the defendants. *Id.*, at 58–61. He justified this conclusion with respect to the substantive counts on the ground that they were materially unchanged from the valid initial indictment to the superseding indictment. *Id.*, at 58–59. With respect to the conspiracy count, which had been expanded by the superseding indictment, he justified his conclusion on the ground that the grand jury "had before it ample independent evidence [apart from the joint testimony] to support a probable cause finding of the charges." *Id.*, at 61. In light of these conclusions, Judge Copenhaver determined that a post-trial dismissal of the indictment would simply confer a windfall benefit on the defendants "who stand convicted after a three-month trial conducted at enormous expense to the United States and the defendants." *Ibid.* The judge nevertheless undertook to ensure future compliance with the one-witness rule by directing the Government to keep the court advised concerning compliance with Rule 6(d) in future criminal cases. *Ibid.*

A divided Court of Appeals reversed the conspiracy convictions, affirmed the others, and dismissed the conspiracy portion of the indictment. 735 F. 2d 136 (1984). It reasoned that the language of Rule 6(d) is so "plain and unequivocal in limiting who may appear before a grand jury," *id.*, at 139, that its transgression requires automatic reversal of any subsequent conviction regardless of the lack of prejudice. *Id.*, at 139–140. But the court reversed only the conspiracy convictions because it found that the violation of Rule 6(d) tainted only the portion of the superseding indictment that related to them. *Id.*, at 140. A divided en banc decision agreed. 756 F. 2d 994 (1985) *(per curiam)*.

We assume for the sake of argument that the simultaneous presence and testimony of the two Government witnesses before the grand jury violated Rule 6(d), and that the District Court would have been justified in dismissing portions of the indictment on that basis had there been actual prejudice and had the matter been called to its attention before the commencement of the trial. But although the defendants appear to have been reasonably diligent in attempting to discover any error at the grand jury proceeding, they did not acquire the transcript showing that the two agents had appeared jointly in the grand jury proceeding until the second week of trial. Nor is there any suggestion that the Government designedly withheld the information. When the defendants made their motion to dismiss the indictment based on the joint testimony, Chief Judge Knapp denied the motion because of his view that there had been no violation of Rule 6(d). Judge Copenhaver eventually issued a contrary ruling on the resubmitted motion, but not until after the long and costly trial had been brought to its conclusion. Although we do not believe that the defendants can be faulted for any lack of diligence, we nonetheless hold that the supervening jury verdict made reversal of the conviction and dismissal of the indictment inappropriate.

Both the District Court and the Court of Appeals observed that Rule 6(d) was designed, in part, "to ensure that grand jurors, sitting without the direct supervision of a judge, are not subject to undue influence that may come with the presence of an unauthorized person." 735 F. 2d, at 139. The Rule protects against the danger that a defendant will be required to defend against a charge for which there is no probable cause to believe him guilty. The error involving Rule 6(d) in these cases had the theoretical potential to affect the grand jury's determination whether to indict these particular defendants for the offenses with which they were charged. But the petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt. Measured by the petit jury's verdict, then, any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt.[1]

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[1] In *Vasquez* v. *Hillery*, 474 U. S. 254 (1986), the Court set aside a final judgment of conviction because of racial discrimination in the composition

It might be argued in some literal sense that because the Rule was designed to protect against an erroneous charging decision by the *grand jury*, the indictment should not be compared to the evidence produced by the Government at *trial*, but to the evidence produced before the *grand jury*. But even if this argument were accepted, there is no simple way after the verdict to restore the defendant to the position in which he would have been had the indictment been dismissed before trial. He will already have suffered whatever inconvenience, expense, and opprobrium that a proper indictment may have spared him. In courtroom proceedings as elsewhere, "the moving finger writes; and, having writ, moves on." Thus reversal of a conviction after a trial free from reversible error cannot restore to the defendant whatever benefit might have accrued to him from a trial on an indictment returned in conformity with Rule 6(d).

We cannot accept the Court of Appeals' view that a violation of Rule 6(d) requires automatic reversal of a subsequent conviction regardless of the lack of prejudice. Federal Rule of Criminal Procedure 52(a) provides that errors not affecting substantial rights shall be disregarded. We see no reason not to apply this provision to "errors, defects, irregularities, or variances" occurring before a grand jury just as we have

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of the grand jury that indicted the defendant. It found this result to be compelled by precedent directly applicable to the special problem of racial discrimination. *Id.*, at 260–262. It also reasoned that racial discrimination in the selection of grand jurors is so pernicious, and other remedies so impractical, that the remedy of automatic reversal was necessary as a prophylactic means of deterring grand jury discrimination in the future, *id.*, at 262, and that one could presume that a discriminatorily selected grand jury would treat defendants of excluded races unfairly. *Id.*, at 263–264.

We think that these considerations have little force outside the context of racial discrimination in the composition of the grand jury. No long line of precedent requires the setting aside of a conviction based on a rule violation in the antecedent grand jury proceedings, and the societal interest in deterring this sort of error does not rise to the level of the interest in deterring racial discrimination. See, *e. g.*, *Gerstein* v. *Pugh*, 420 U. S. 103, 119–123 (1975); *Coleman* v. *Alabama*, 399 U. S. 1, 10–11 (1970); *Chapman* v. *California*, 386 U. S. 18 (1967).

applied it to such error occurring in the criminal trial itself. See *United States* v. *Hasting*, 461 U. S. 499, 509 (1983); *Chapman* v. *California*, 386 U. S. 18, 21–24 (1967); *United States* v. *Lane*, 474 U. S. 438 (1986).

The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; victims may be asked to relive their disturbing experiences. See *Morris* v. *Slappy*, 461 U. S. 1, 14 (1983). The "[p]assage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible." *Engle* v. *Isaac*, 456 U. S. 107, 127–128 (1982). Thus, while reversal "may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution," *id.*, at 128, and thereby "cost society the right to punish admitted offenders." *Id.*, at 127. Even if a defendant is convicted in a second trial, the intervening delay may compromise society's "interest in the prompt administration of justice," *United States* v. *Hasting*, *supra*, at 509, and impede accomplishment of the objectives of deterrence and rehabilitation. These societal costs of reversal and retrial are an acceptable and often necessary consequence when an error in the first proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence. But the balance of interest tips decidedly the other way when an error has had no effect on the outcome of the trial.

We express no opinion as to what remedy may be appropriate for a violation of Rule 6(d) that has affected the grand jury's charging decision and is brought to the attention of the trial court before the commencement of trial.[2] We hold only that however diligent the defendants may have been in seeking to discover the basis for the claimed violation of Rule 6(d), the petit jury's verdict rendered harmless any conceivable error in the charging decision that might have flowed from the violation. In such a case, the societal costs of retrial after a jury verdict of guilty are far too substantial to justify setting aside the verdict simply because of an error in the earlier grand jury proceedings. The judgment of the Court of Appeals is therefore reversed to the extent it set aside the conspiracy convictions and dismissed the indictment, but is otherwise affirmed.

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[2] The Government argues that it was improper to reverse the conspiracy convictions because "[a]n indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits." *Costello* v. *United States*, 350 U. S. 359, 363 (1956). We need not reach

It is so ordered.

CHIEF JUSTICE BURGER, concurring.

I concur in JUSTICE REHNQUIST's opinion for the Court. I write separately only to state my view that this case is controlled by Justice Black's opinion for the Court in *Costello* v. *United States*, 350 U. S. 359 (1956).

JUSTICE O'CONNOR, with whom JUSTICE BRENNAN and JUSTICE BLACKMUN join, concurring in the judgment.

I agree with the Court that the convictions obtained in the trial court against defendants Mechanik and Lill should not have been set aside. I write separately because I believe that the analysis adopted by the Court for determining the effect of a violation of the rules governing the conduct of grand juries effectively renders those rules a dead letter, thereby seriously undermining the grand jury's traditional function of protecting the innocent from unwarranted public accusation.

The grand jury has two principal functions. First, it bears the weighty responsibility of investigating crime and determining whether there is probable cause to believe that a crime has been committed. *United States* v. *Calandra*, 414

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this argument of the Government because of the narrower ground upon which we rest our decision.

U. S. 338, 343 (1974). The second, and no less important, task of the grand jury is to "serv[e] the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or dictated by an intimidating power or by malice and personal ill will." *Wood* v. *Georgia*, 370 U. S. 375, 390 (1962). To further the grand jury's investigative function, the grand jury traditionally has been given "wide latitude" in its inquiries. *Calandra*, *supra*, at 343. See also *United States* v. *Dionisio*, 410 U. S. 1, 17–18 (1973). Prosecutors have been accorded similar leeway in presenting their cases to the grand jury, see, *e. g.*, *United States* v. *Adamo*, 742 F. 2d 927, 936–938 (CA6 1984), cert. denied, 469 U. S. 1193 (1985), but they are bound by a few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury's functions.

Federal Rule of Criminal Procedure 6(d) is one such rule; it is designed to guard the secrecy of the grand jury proceedings, prevent intimidation of jurors, and guarantee that the grand jury is given the opportunity to make an independent examination of the evidence and render its probable cause and charging determinations free of undue prosecutorial influence. See, *e. g.*, *United States* v. *Echols*, 542 F. 2d 948, 951 (CA5 1976), cert. denied, 431 U. S. 904 (1977); *United States* v. *Lill*, 511 F. Supp. 50, 55–57 (SD W. Va. 1980); 1 C. Wright, Federal Practice & Procedure § 105, p. 237, and n. 1 (2d ed. 1982). For example, if the Government, in violation of Rule 6(d), were to have all witnesses remain in the courtroom while the grand jury investigation was going on to ensure that all testified in a consistent manner, it cannot seriously be doubted that this practice would hinder the grand jury in its task of uncovering the truth. Similarly, if the prosecuting attorney were to remain in the jury room during the jury's deliberations in contravention of the Rule, a very real possibility would arise that the jury's deliberations or vote would be unduly influenced by the prosecutor's presence.

The Federal Rules clearly envision that dismissal of the indictment may be an appropriate remedy for such violations of Rule 6(d). See, *e. g.*, Fed. Rule Crim. Proc. 12(b)(2). Indeed, courts have consistently employed the remedy of dismissal of the indictment for deviations from Rule 6(d) which may imperil the grand jury's independence. See, *e. g.*, *Lill*, *supra*, at 58 (collecting federal cases). See also Nadel, Presence of Unauthorized Persons During State Grand Jury Proceedings as Affecting Indictment, 23 A.L.R. 4th 397 (1983) (hereinafter Nadel) (collecting state cases dealing with similar violations of state rules). To be sure, a violation must be clearly established before dismissal may be contemplated. The grand jury proceeding is accorded a presumption of regularity, which generally may be dispelled only upon particularized proof of irregularities in the grand jury process. See, *e. g.*, *United States* v. *Johnson*, 319 U. S. 503, 512–513 (1943). And not every violation of Rule 6(d) will create such a likelihood of prejudice as to warrant the drastic remedy of dismissal. The Federal Rules dictate that dismissal is appropriate only when a violation has impaired the substantial rights of the accused. See Fed. Rule Crim. Proc. 52.

Rule 52(a) provides that its harmless error inquiry extends to "[a]ny error, defect, irregularity or variance." The Advisory Committee's notes to Rule 52 state that "[t]his rule is a restatement of existing law," which specifically provided for a harmless error analysis of objections going to the validity of the indictment in 18 U. S. C. § 556 (1946 ed.). See 18 U. S. C. App., p. 657. The language of Rule 6 does not exempt the Rule from a harmless error scrutiny. In fact, the commentary accompanying it states that the Rule "generally continues existing law" and expressly refers to the harmless error rule of 18 U. S. C. § 556 (1946 ed.), thereby confirming the rulemakers' intent that violations of Rule 6(d) would be among those errors subject to harmless error review. See

Advisory Committee's Notes on Fed. Rule Crim. Proc. 6(d), 18 U. S. C. App., p. 568.

A Rule 6(d) violation is one affecting the grand jury proceeding and is not in any sense a trial error. Accordingly, the logical focus of the harmless error inquiry is an examination of the influence of the error on the charging decision. Indeed, in most Rule 6(d) cases, a court conducting a harmless error inquiry will of necessity focus on the effect of the alleged error on the grand jury's charging decision, rather than the verdict, because the rules governing the disclosure of grand jury materials to defendants and the waiver provision of Rule 12(f) virtually ensure that all claims of violations of Rule 6(d) will be made before or during trial. See, *e. g.*, 18 U. S. C. §3500; Fed. Rules Crim. Proc. 6(e)(3)(C)(i), (ii); *Dennis* v. *United States*, 384 U. S. 855, 868–875 (1966); 8 J. Moore, Federal Practice ¶6.05[3] (2d ed. 1985) (discussing defendants' access to grand jury materials under the above cited authorities). See also *Lill*, *supra*, at 58, 61 (most reported Rule 6(d) claims raised and disposed of before trial).

In my view, when, as in these cases, a court decides to reserve the ruling on a timely raised and diligently pursued motion to dismiss based on an alleged violation of Rule 6(d) until after a verdict is returned, the focus of the court's inquiry should remain on the grand jury's charging decision. Yet the Court shifts the focus of the harmless error analysis in such circumstances from an examination of the violation's effect on the indictment to an assessment of the violation's effect on the trial verdict, without regard to the timing of the defendants' objection. See *ante*, at 70–71. The Court then concludes that a conviction automatically renders harmless any violation of Rule 6(d). This holding is not justified by the applicable rules, nor can it be reconciled with precedent.

A number of federal courts have employed a rule directly in conflict with that adopted by the Court: they presume the existence of prejudice from the presence of unauthorized persons in the grand jury room and apply a rule of automatic dismissal of the tainted indictment. See, *e. g.*, *United States* v. *Fulmer*, 722 F. 2d 1192, 1195, n. 5 (CA5 1983); *Echols*, 542 F. 2d, at 951; *Latham* v. *United States*, 226 F. 420 (CA5 1915); *Lill*, 511 F. Supp., at 58 (collecting lower federal cases). See also Nadel §4 (collecting state cases); 2 W. LaFave & J. Israel, Criminal Procedure §15.6 (1984). Other courts have applied a harmless error test to Rule 6(d) violations, but have uniformly evaluated the prejudice to the defendant by looking to the violation's likely effect on the grand jury's deliberations, not merely to its significance in light of the trial verdict. See, *e. g.*, *United States* v. *Condo*, 741 F. 2d 238, 239 (CA9 1984) *(per curiam)*, cert. denied, 469 U. S. 1164 (1985); *United States* v. *Computer Sciences Corp.*, 689 F. 2d 1181, 1185–1186 (CA4 1982), cert. denied, 459 U. S. 1105 (1983); *United States* v. *Kahan & Lessin Co.*, 695 F. 2d 1122, 1124 (CA9 1982) *(per curiam); United States* v. *Rath*, 406 F. 2d 757, (CA6), cert. denied, 394 U. S. 920 (1969). I have found no Rule 6(d) cases in which a *per se* rule based on the ultimate verdict at trial has been applied. Cf. also *United States* v. *Lane*, 474 U. S. 438, 447–448 (1986) (disapproving use of *per se* rules in harmless error analysis).

The Court's focus on the effect of the verdict, in combination with its *per se* rule, gives judges and prosecutors a powerful incentive to delay consideration of motions to dismiss based on an alleged defect in the indictment until the jury has spoken. If the jury convicts, the motion is denied; if the jury acquits, the matter is mooted. The Court's approach thus undermines the authority of Rule 6(d), exposes to the ordeal of trial any defendants who would otherwise have a right to dismissal of the indictment, and undermines adherence to the very measures that this Court proposed and Congress implemented to guarantee that the grand jury is able to perform properly its screening function.

In my view, when a defendant makes a timely objection to the grand jury indictment based on a violation of Rule 6(d), the remedy of dismissal of the indictment is appropriate if it is established that the violation substantially influenced the grand jury's decision to indict, or if there is grave doubt as to whether it had such effect. See *Lane*, *supra*, at 449; *Kotteakos* v. *United States*, 328 U. S. 750, 765 (1946). The focus of the prejudice inquiry should be on the effect of the alleged error on the grand jury's decision to indict even if the court postpones its decision until the conclusion of the trial.

This approach would not impose unwarranted costs on the criminal justice system. The prosecution has it within its power to avoid dismissals by adhering to the simple dictates of Rule 6(d), and to remedy any violation of the Rule by obtaining a superseding indictment so as to avoid the risks of subsequent dismissals. Even where an unremedied violation is proved, the trial judge must still be satisfied that the violation resulted in grand jury intimidation or improper influence on important witnesses' testimony and thus had a "substantial influence" on the indictment returned, or that there is grave doubt as to whether it had such effect. *Kotteakos*, *supra*, at 765. See also *Lane*, *supra*, at 449.

In these cases, the District Court found, after a scrupulous examination of the record, that the violation was harmless, a finding which was not found wanting on appeal. The District Court preliminarily observed:

> "It is especially significant to note that the two indictments were returned by the same grand jury. The court's review of the attendance and voting records of that grand jury reveals that each of these indictments was returned by a unanimous vote. A nucleus of the same seventeen grand jurors voted for each indictment. In addition, one other grand juror voted for the first indictment but did not vote on the second, while two others voted for the second indictment but did not vote on the first." 511 F. Supp., at 58–59.

Both agents had testified separately before the same grand jury in support of the first, untainted indictment, giving the jury ample opportunity to weigh the credibility of each agent prior to their joint appearance. Moreover, both agents had access to all grand jury materials in the case pursuant to Rule 6(e)(3)(A)(ii), and thus the likelihood that their joint testimony created a potential for collusion not already available is minute.

Turning to an examination of the indictment itself, the District Court found that the substantive counts of which the defendants were convicted were "identical or virtually so" to the counts returned in the superseded indictment and that those counts had "a probable cause basis entirely independent of the testimony presented to the grand jury after the return of the [superseded] first indictment." *Id.*, at 59. It concluded that as to the substantive counts, "there was neither prejudice nor potential for prejudice." *Ibid.* Thus, the only count upon which the defendants could have been prejudiced by the objectionable joint testimony of the Drug Enforcement Administration agents was the conspiracy count.

Although the District Court conducted its post-trial harmless error review in part with an eye to the effect of the error on the verdicts, its findings also make clear that the effect of the joint testimony on the grand jury's decision to indict on the conspiracy count was negligible. The District Court carefully isolated the alterations and additions to that count which were the subject of the joint testimony. After examining the testimony given by other grand jury witnesses, the trial judge concluded that "the grand jury would, in my view, undoubtedly have returned the very same second indictment even had [the] Agents . . . testified separately." *Id.*, at 61. Accordingly, I would reverse the judgment of the Court of Appeals insofar as it set aside the defendants' conspiracy convictions and affirm the Court of Appeals' judgment regarding the defendants' cross-petitions.

JUSTICE MARSHALL, dissenting.

The Court concedes that federal prosecutors violated Rule 6(d) of the Federal Rules of Criminal Procedure in presenting their case against defendants Mechanik and Lill to the grand jury. The Court holds, however, that because defendants were ultimately convicted of some of the counts against them, "any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt." *Ante*, at 70. Because I believe that the majority's rule misconceives the role both of the grand jury and of the harmless-error doctrine, I dissent.

I

The Court's decision today renders Rule 6(d) almost unenforceable. As the facts of this litigation demonstrate, Rule 6(d) violations are difficult for defendants to uncover. The grand jury conducts its investigation in secret, aided only by the prosecutors and witnesses. *United States* v. *Calandra*, 414 U. S. 338, 343 (1974). Defendants are not entitled to grand jury transcripts before trial; due to the strictly enforced tradition of grand jury secrecy, defendants generally have access to no information whatsoever regarding the conduct of the grand jury proceedings. See M. Frankel & G. Naftalis, The Grand Jury 81–89 (1977). Requests by defendants pursuant to Rule 6(e)(3)(C)(ii) for disclosure of grand jury materials, "upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury," are rarely granted; a defendant often can make the necessary showing only with the aid of the materials he seeks to discover. See 1 C. Wright, Federal Practice and Procedure § 108, pp. 263–265 (2d ed. 1982). Defendants' only access to grand jury materials is likely to be through the medium of the Jencks Act, 18 U. S. C. § 3500, which requires the prosecutor, after direct examination of a Government witness, to produce the witness' prior statements. That disclosure, however, does not take place until after trial has begun, and then only on a piecemeal and incomplete basis.

There is thus little likelihood that a defendant can raise a substantial claim under Rule 6(d) before his trial begins. After the start of trial, overwork and the press of events may prevent the district judge from disposing of a newly raised Rule 6(d) claim. The most attractive course for the district judge will be to defer a ruling until the close of trial, the course ultimately followed in this case. Indeed, the district judge may not have the opportunity to rule until that time. Under today's decision, however, deferring a meritorious Rule 6(d) claim until the close of trial disposes of it permanently. If the movant is acquitted, then his Rule 6(d) motion is moot; if the movant is convicted, under the majority's reasoning, then any error was harmless. The Court's decision thus offers busy district judges a new and unique way to reduce their workload; one need not believe in a judicial conspiracy against the assertion of Rule 6(d) rights to suspect that district judges, faced with Rule 6(d) motions necessarily raised in the middle of trial, will follow the Court's invitation.

Should a district judge decide a Rule 6(d) motion during trial, the majority's scheme insulates that ruling from appellate review. Appeal before judgment is unlikely; the Court has never allowed immediate appeal of an order issued after the start of a criminal trial. See *Flanagan* v. *United States*, 465 U. S. 259, 269 (1984).[1] And under the decision today, such rulings cannot be appealed after judgment. Enforcement of Rule 6(d) is thus left to the unreviewable largesse of the district court.

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[1] Denial of a Rule 6(d) motion could conceivably be subject to interlocutory appeal under the collateral-order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949). Such an order may be both collateral to the main action and, as a result of today's opinion, wholly unreviewable after final judgment. Cf. *United States* v. *Hollywood Motor Car Co.*, 458 U. S. 263, 267 (1982) (claim that indictment should be dismissed on grounds of prosecutorial vindictiveness not subject to interlocutory appeal because reviewable after conviction); *United States* v. *Garner*, 632 F. 2d 758 (CA9 1980) (claim that indictment should be dismissed on grounds of grand jury irregularities not subject to interlocutory appeal be-

II

A

We have no reason to believe that Congress intended Rule 6(d) to have so little practical meaning. The legislative history of Rule 6, indeed, belies that approach. In 1933, Congress was faced with "a conflict of legal decision as to the right, under existing law, to permit stenographers in grand jury rooms without invalidating the subsequent conviction of defendant." S. Rep. No. 64, 73d Cong., 1st Sess., 1 (1933). It responded by adding a narrow clause to the harmless-error statute, Rev. Stat. § 1025 (later codified as 18 U. S. C. § 556 (1946 ed.)), providing that no indictment should be found insufficient, or conviction be reversed, because of the presence of stenographers in the grand jury room. But Congress nowhere expressed disagreement with the general proposition that the presence of an unauthorized person in the grand jury room invalidates a subsequent conviction. *E. g., United States* v. *Fall*, 56 App. D. C. 83, 84, 10 F. 2d 648, 649 (1925); *Latham* v. *United States*, 226 F. 420, 424 (CA5 1915).

More recently, Congress amended Rule 6 in 1972 to incorporate by reference the provisions of the Jury Selection and Service Act of 1968; it provided that a defendant may move to dismiss the indictment based on the Government's failure to comply with that Act in the selection of the grand jury array or of individual grand jurors. Fed. Rule Crim. Proc. 6(b)(2). The advisory notes expressly state that the district judge may rule on such a challenge to the grand jury either before or after the verdict. Advisory Committee Notes on Fed. Rule Crim. Proc. 6, 18 U. S. C. App., p. 568 (1972 amendment). There is no hint that Congress, in providing for a

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cause reviewable after conviction); *United States* v. *Bird*, 709 F. 2d 388, 391, and n. 17 (CA5 1983) (collecting cases).

ruling after the verdict, intended that ruling to be a mere intellectual exercise.

B

The majority's opinion misconceives the role of harmless-error analysis. We have recognized that harmless-error doctrine, denying any remedy in cases of clear prosecutorial misconduct, "can work very unfair and mischievous results." *Chapman* v. *California*, 386 U. S. 18, 22 (1967). Denying defendants relief for clear violations of their procedural rights reduces the law to "'pretend-rules,'" *United States* v. *Borello*, 766 F. 2d 46, 58 (CA2 1985), quoting *United States* v. *Antonelli Fireworks Co.*, 155 F. 2d 631, 661 (CA2) (Frank, J., dissenting), cert. denied, 329 U. S. 742 (1946); it means that prosecutors are free to engage in prohibited conduct subject only to "purely ceremonial" words of appellate displeasure. 155 F. 2d, at 661.

The Court's rule that all grand jury misconduct becomes harmless after conviction, however, is especially pernicious. Contrary to the majority's suggestion that reversal is too costly a remedy for grand jury misconduct, *ante*, at 72, it is the majority's refusal to reverse convictions for demonstrated grand jury misconduct that imposes unacceptable costs. There are few limitations on the conduct of the prosecutor before the grand jury. Those limitations are found only in Federal Rule of Criminal Procedure 6, the text of which takes up little more than a page in the official compilation of United States laws. Violations of even those isolated restrictions, in by far the majority of cases, will go undetected by defendants. The only way to allow even minimally effective enforcement of those rules is to reverse the convictions of defendants whose indictments were tainted by Rule 6 violations.

Such an approach would not hamper the enforcement of the criminal law. Violations of Rule 6(d) will be nonexistent if the prosecutor exercises proper control over access to the grand jury chambers. The substantive law is not onerous or ambiguous, and most violations are the product of the prosecutor's failure to adopt safeguards to ensure compliance. See 2 W. LaFave & J. Israel, Criminal Procedure § 15.6, p. 333 (1984). There is no danger of a prosecutor slipping into an inadvertent Rule 6(d) violation comparable to that, say, of making an ill-worded remark in the heat of trial. Courts would not often have cause to reverse convictions because of Rule 6(d) violations.

The majority's goal of upholding criminal convictions not marred by substantial defect does not justify reducing Congress' command regarding the proper conduct of grand jury proceedings to a mere form of words, without practical effect. Respect for the rule of law demands that improperly procured indictments be quashed even after conviction, because "only by upsetting convictions so obtained can the ardor of prosecuting officials be kept within legal bounds and justice be secured; for in modern times all prosecution is in the hands of officials." *United States* v. *Remington*, 208 F. 2d 567, 574 (CA2 1953) (L. Hand, J., dissenting).[2]

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[2] Our case law, further, is inconsistent with the majority's broad holding that *any* error in the grand jury proceedings, no matter how egregious, is rendered harmless beyond a reasonable doubt by a petit jury's subsequent guilty verdict. *Vasquez* v. *Hillery*, 474 U. S. 254 (1986), involving the "grave constitutional trespass" of racial discrimination, *id.*, at 262, belies that holding. The Court's assessment of the nature of the grand jury process refutes the rationale articulated by the majority today:

"Nor are we persuaded that discrimination in the grand jury has no effect on the fairness of the criminal trials that result from that grand jury's actions. The grand jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not. In the hands of the grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a noncapital offense—all on the basis of the same facts. Moreover, '[t]he grand jury is not bound to indict in every case where a conviction can be obtained.' *United States* v. *Ciambrone*, 601 F. 2d 616, 629 (CA2 1979) (Friendly, J., dissenting). *Thus, even if a grand jury's determination of probable cause is confirmed in hindsight by a conviction on the indicted offense, that confirmation in no way suggests*

III

The opinion concurring in the judgment suggests that the Rule 6(d) violation in this litigation should be viewed as harmless on the theory that the grand jury would have returned the same indictment regardless of the prosecutor's misconduct. Under that approach, a district court faced with a Rule 6(d) violation should examine the grand jury transcripts in an attempt to divine the effect of the violation on the jury's charging decision, and allow the indictment or conviction to stand only if it finds that there was no such effect. Such a rule would be contrary to the traditional black-letter law that "[a]ny violation of Rule 6(d) is *per se* prejudicial to the defendant and will result in dismissal of the indictment," 8 J. Moore, Federal Practice ¶6.04[7], p. 6–91 (2d ed. 1985).[3] I believe that such an approach would be unworkable and would undermine the limits Congress imposed on the conduct of grand jury investigations.

Many of the reasons given above for rejecting the majority's view that grand jury impropriety is *always* harmless

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that the discrimination did not impermissibly infect the framing of the indictment and, consequently, the nature or very existence of the proceedings to come." *Vasquez* v. *Hillery*, *supra*, at 263 (emphasis added).

[3] See also 2 W. LaFave & J. Israel, Criminal Procedure § 15.6, p. 332 (1984) ("Most federal courts . . . treat unauthorized presence as a per se ground for dismissal, requiring no showing of prejudice"). Cases cited by the Solicitor General as requiring harmless-error analysis are distinguishable. Those cases involved only brief, inadvertent interruptions of the grand jury, during which the grand jury proceedings came to an immediate halt, *United States* v. *Computer Sciences Corp.*, 689 F. 2d 1181, 1185–1186 (CA4 1982), cert. denied, 459 U. S. 1105 (1983); *United States* v. *Kahan & Lessin Co.*, 695 F. 2d 1122, 1124 (CA9 1982); *United States* v. *Rath*, 406 F. 2d 757 (CA6), cert. denied, 394 U. S. 920 (1969), or a "fleeting" appearance in the grand jury room by a person assisting in the movement of bulky documents, *United States* v. *Condo*, 741 F. 2d 238, 239 (CA9 1984), cert. denied, 469 U. S. 1164 (1985). Indeed, the Fourth Circuit panel, whose reasoning was adopted by the en banc court, saw no inconsistency between *Computer Sciences*, *supra*, and the *per se* rule of the instant case. 735 F. 2d 136, 139–140 (1984).

once a verdict is reached, apply in this context as well. Given defendants' difficulty in discovering Rule 6(d) violations, it is all the more important that dismissal of the indictment be certain when violations of the Rule are found. Only such a sanction can come close to providing prosecutors with an incentive to obey the Rule's commands. See *United States* v. *Pignatiello*, 582 F. Supp. 251, 255 (Colo. 1984).

Such harmless-error analysis, moreover, overlooks the practical impossibility of determining the effect of a Rule 6(d) violation. The prejudicial impact of the unauthorized presence of persons in the grand jury room will often be impossible to quantify, and may not be apparent from the grand jury transcript. As one court wrote:

> "A change in expression, a pressure on the hand or a warning glance would not be shown upon the minutes but might well influence, suppress or alter testimony to the prejudice of the defendant. There may have been prior expressions or conversations between the two witnesses which the one then giving testimony might well hesitate to repudiate or modify in the presence of the other. The District Attorney here contends . . . that defendant suffered no prejudice by the joint presence of the two sisters, but . . . '[t]he court cannot know that this suggestion represents the fact.' We think the practice offers too great a possibility for the exercise of undue influence to be condoned." *State* v. *Revere*, 232 La. 184, 207, 94 So. 2d 25, 34 (1957) (emphasis omitted; citations omitted; internal quotations omitted).

Any case-by-case analysis to determine whether the defendant was actually prejudiced is simply too speculative to afford defendants meaningful protection, and imposes a difficult burden on the courts that outweighs the benefits to be derived. The distinction between the truly harmless error and the more dangerous one is not "such a pronounced one that the Court can cloak the one with the mantle of legality and yet recognize the dangers of the other and prohibit it." *United States* v. *Carper*, 116 F. Supp. 817, 821 (DC 1953).

That approach, finally, is likely to require a detailed inquiry that will frustrate and undermine the secrecy of grand jury inquiry. See *United States* v. *Treadway*, 445 F. Supp. 959 (ND Tex. 1978). The district court may have to discuss the testimony of grand jury witnesses who did not appear at trial. The goals of grand jury secrecy, however, counsel that such analysis should not be spread across the public record. See *United States* v. *Sells Engineering, Inc.*, 463 U. S. 418, 424–425 (1983).[4]

IV

This litigation illustrates the extent to which the Court is willing to reduce the substantive law to "pretend-rules," *Borello*, 766 F. 2d, at 58, in order to affirm a criminal conviction. But by denigrating Congress' commands and eviscerating enforcement of Rule 6(d), the Court creates "a greater danger to a free people than the escape of some criminals from punishment." *United States* v. *Di Re*, 332 U. S. 581, 595 (1948). I believe that the District Court in this case should have reversed defendants' conspiracy convictions without inquiry into the prejudice done to defendants by the Rule 6(d) violation. I therefore would affirm the judgment of the Court of Appeals.

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[4] JUSTICE O'CONNOR suggests, noting the reference to 18 U. S. C. § 556 (1946 ed.) in the Advisory Committee Notes to Rule 6, that the rulemakers intended violations of Rule 6(d) to be subject to the harmless-error rule. *Ante*, at 75–76. The legislative history of former § 556 does not support that view. The section, as first enacted in 1872, provided that "[n]o indictment . . . shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection *in matter of form only*, which shall not tend to the prejudice of the defendant." Rev. Stat. § 1025 (emphasis added). There is no indication that this law was meant to disturb the settled law regarding unauthorized persons in the grand jury room, see *United States* v. *Edgerton*, 80 F. 374 (Mont. 1897); rather, it seems likely that the statute was directed at technical defects in the *wording* of the indictment, see, *e. g.*, *People* v. *St. Clair*, 56 Cal. 406 (1880) (reversing conviction because word "larceny" in indictment was misspelled); *People* v. *Vice*, 21 Cal. 344 (1864) (reversing conviction because indictment, while alleging that defendant took certain property by threats and force, failed to allege that the property did not belong to defendant). See also *supra*, at 82.

UNITED STATES *v.* MAINE ET AL.

ON EXCEPTION TO REPORT OF SPECIAL MASTER

No. 35, Orig. Argued December 12, 1985—Decided February 25, 1986

This case, which was instituted by the United States to quiet title to the seabed along the coast of the Atlantic Ocean, presents the question whether Nantucket Sound qualifies as "internal waters" of Massachusetts rather than partly territorial sea and partly high seas as the United States contends. Massachusetts has excepted to the portion of the Special Master's report that concludes that Nantucket Sound is not a part of Massachusetts' inland waters under the doctrine of "ancient title." Massachusetts contends that, under such doctrine, the English Crown acquired title to Nantucket Sound as a result of discovery and occupation by colonists in the early 17th century, and that Massachusetts has succeeded to the Crown's title.

Held: Massachusetts cannot prevail under the doctrine of "ancient title." Pp. 93–105.

(a) Principles of international law have been followed consistently in fixing the United States' coastline. Massachusetts contends that the doctrine of "ancient title" is a sufficient basis for identifying a "historic bay," under Article 7(6) of the Convention on the Territorial Sea and Contiguous Zone, so as to constitute "internal waters" of the sovereign. To claim "ancient title" to waters that would otherwise constitute high seas or territorial sea, a sovereign must base its title on "occupation," that is, a title based on "clear original title" which is fortified "by long usage." The parties agree that effective "occupation" must have taken place before the freedom of the seas became a part of international law—no later than the latter half of the 18th century. Pp. 93–96.

(b) The pertinent exhibits and transcripts show that Massachusetts did not effectively "occupy" Nantucket Sound so as to obtain "clear original title" and fortify that title "by long usage" before the seas were recognized to be free. For purposes of the "ancient title" doctrine, "occupation" requires, at a minimum, the existence of acts, attributable to the sovereign, manifesting an assertion of exclusive authority over the waters claimed. The historical evidence introduced by Massachusetts does not show occupation by the colonists of Nantucket Sound as a whole. Massachusetts' evidence of occupation is also deficient because it does not warrant a finding that the colonists asserted any exclusive right to the waters. Moreover, Massachusetts has not established any linkage between the colonists' activities and the English Crown. Thus, Great

Britain did not obtain title which could devolve upon Massachusetts. Pp. 97–103.

(c) The determination that Massachusetts had not established clear title prior to freedom of the seas is corroborated by its consistent failure to assert dominion over Nantucket Sound since that time. Rather, during the 18th and 19th centuries Massachusetts continued to treat Nantucket Sound in a manner inconsistent with its recent characterization of that body as internal waters. Pp. 103–105.

Exception overruled.

STEVENS, J., delivered the opinion of the Court, in which all other Members joined, except MARSHALL, J., who took no part in the consideration or decision of the case.

Henry Herrmann, Special Assistant Attorney General of Massachusetts, argued the cause for defendant Commonwealth of Massachusetts. With him on the briefs were *Francis X. Bellotti*, Attorney General, and *William L. Pardee*, Assistant Attorney General.

Deputy Solicitor General Claiborne argued the cause for the United States. With him on the brief were *Acting Solicitor General Fried, Assistant Attorney General Habicht*, and *Michael W. Reed.*

JUSTICE STEVENS delivered the opinion of the Court.

The question now before the Court is whether Nantucket Sound qualifies as "internal waters" of the Commonwealth of Massachusetts rather than partly territorial sea and partly high seas as the United States contends. We agree with the Special Master's conclusion that the Commonwealth's claim should be rejected.

I

Pursuant to an earlier decree of this Court,[1] the United States and Massachusetts in 1977 filed a joint motion for supplemental proceedings to determine the location of the Massachusetts coastline. After our appointment of a Special Master, 433 U. S. 917 (1977), the parties agreed on a partial settlement, which we approved in 1981. 452 U. S. 429. Left unresolved was the status of Vineyard Sound and Nantucket Sound, a dispute which gave rise to extensive hearings before the Special Master. The Master concluded that Vineyard Sound is a "historic bay" and therefore a part of the inland waters of Massachusetts. However, he reached a contrary conclusion concerning Nantucket Sound. Explaining that the decision concerning Vineyard Sound has only minimal practical significance,[2] the United States has taken no exception to the Master's report. Massachusetts, however, has excepted to that part of the report concerning Nantucket Sound. Specifically, although Massachusetts acquiesces in the determination that the doctrine of "historic title" does not support its claim, it continues to maintain that it has "ancient title" to Nantucket Sound.

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[1] In 1968 the United States invoked our original jurisdiction to quiet title to the seabed along the coast of the Atlantic Ocean. In 1975 we entered a decree affirming the title of the United States to the seabed more than three geographic miles seaward of the coastline, and of the States to the seabed within the 3-geographic-mile zone. *United States* v. *Maine*, 423 U. S. 1 (1975). See also *United States* v. *Maine*, 420 U. S. 515 (1975). In

Nantucket Sound is a relatively shallow body of water south of Cape Cod, northeast of the island of Martha's Vineyard, and northwest of the island of Nantucket. Massachusetts contends that the English Crown acquired title to this territory as a result of discovery and occupation by colonists in the early 17th century and that it succeeded to the Crown's title by virtue of various Royal Charters or by the Treaty of Paris, which ended the Revolutionary War.[3]

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that decree we reserved jurisdiction which either the "United States or any defendant State [could] invoke . . . by filing a motion in this Court for supplemental proceedings." 423 U. S., at 2.

[2] According to the Solicitor General, all but 1,000 acres of the submerged lands of Vineyard Sound belong to the Commonwealth of Massachusetts as underlying territorial waters, even under its view that those waters are not inland.

[3] In particular, the Commonwealth points to the charter granted in 1664 by King Charles II to the Duke of York conveying title to New York, New Jersey, and most of New England, cf. *Martin* v. *Waddell*, 16 Pet. 367, 413–414 (1842); *Mahler* v. *Norwich & N. Y. Transp. Co.*, 35 N. Y. 352, 355

To prove that Great Britain acquired title to Nantucket Sound which it could pass to Massachusetts, much of the evidence presented to the Special Master concerned whether Nantucket Sound would have been considered "county waters" under English law in the 17th century. Under the "county waters" doctrine, waters "*inter fauces terrae*" or landward of an opening "between the jaws of the land" could be subject to the jurisdiction of the littoral county rather than the Admiral if the jaws were close enough to each other to satisfy a somewhat ambiguous line-of-sight test. Under Lord Coke's version of the test a person standing on one jaw must be able to "see what is done" on the other jaw;[4] under Lord Hale's more expansive version, it is merely necessary that "a man may reasonably discern between shore and shore."[5]

(1866), and to the charter granted in 1691 by the English monarchs William and Mary to the colonists of Massachusetts consolidating into "one reall Province by the Name of Our Province of the Massachusetts Bay in New England" the territories and colonies that were then commonly known as Massachusetts Bay, New Plymouth, "the Province of Main," and the territory called Accadia or Nova Scotia, see Mass. Ex. 45, p. 8. Alternatively, Massachusetts asserts that it acquired sovereignty over the area by virtue of the Treaty of Paris signed in 1783. Cf. *Manchester* v. *Massachusetts*, 139 U. S. 240, 256–257 (1891); *Mahler* v. *Norwich & N. Y. Transp. Co.*, 35 N. Y., at 356.

[4] 4 E. Coke, Institutes 140 (6th ed. 1681) ("It is no part of the Sea, where one may see what is done of the one part of the water, and of the other, as to see from one Land to the other, that the Coroner shall exercise his office in this case, and of this the Country may have knowledge; whereby it appeareth that things done there are triable by the Country (that is, by Jury) and consequently not in the Admiral Court").

[5] M. Hale, De Jure Maris et Brachiorum ejusdem, cap. iv (1667), reprinted in R. Hall, Essay on the Rights of the Crown and the Privileges of the Subject in the Sea Shores of the Realm, App. vii (2d ed. 1875) ("That arm or branch of the sea, which lies within the *fauces terrae*, where a man may reasonably discerne between shore and shore, is or at least may be within the body of a county, and therefore within the jurisdiction of the sheriff or coroner").

The relevant jaws of land in this case are the southern tip of Monomoy Island, which extends south from the elbow of Cape Cod, and the northern tip of Nantucket Island. At the present time, those two jaws are 9.2 nautical miles apart, but the distance may have been greater in colonial times. In any event, the parties agree that the distance was too great to satisfy Lord Coke's version of the test. Whether it would meet Lord Hale's test depends, in the opinion of the Master, on whether the Commonwealth's burden of proof is merely to persuade by a preponderance of the evidence or by evidence that is "clear beyond doubt." For purposes of our decision, we put to one side the parties' argument about the burden and assume that Lord Hale's test is satisfied.[6] On the assumption that Nantucket Sound could have been considered "county waters" under the common law of England in the 17th century, we nevertheless conclude that Massachusetts cannot prevail under the doctrine of "ancient title" on which it relies.

II

This Court has consistently followed principles of international law in fixing the coastline of the United States.[7] We have relied in particular on the Convention on the Territorial Sea and Contiguous Zone, [1958] 15 U. S. T. 1607, T. I. A. S. No. 5639.[8] The Convention provides that the sovereignty of a state extends to "internal waters." Art. 1. The Convention also contains a set of rules delimiting those waters. Generally speaking, Article 5(1) defines "internal waters" as those waters landward of a baseline which Article 3 in turn defines as "the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State." Of importance to this case, the Convention also includes as a state's "internal waters" those waters enclosed in "bays" as defined in Article 7. Most of the rules in this Article identify the criteria for defining "juridical bays," but Article 7(6) further includes as "bays" "so-called 'historic' bays" and waters landward of baselines marked when "the straight baseline system provided for in Article 4 is applied."

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[6] The Special Master rested his conclusion that Massachusetts had to prove its claim "clear beyond doubt" on two cases of this Court and three reports of Special Masters in original jurisdiction cases. See *Louisiana Boundary Case,* 394 U. S. 11, 77 (1969); *United States* v. *California,* 381 U. S. 139, 175 (1965); Report of the Special Master, O. T. 1983, No. 35 Orig., p. 11; Report of the Special Master, O. T. 1974, No. 9 Orig., pp. 18–19; Report of the Special Master, O. T. 1973, No. 52 Orig., p. 42. Cf. *United States* v. *Louisiana (Alabama and Mississippi Boundary Case),* 470 U. S. 93, 111 (1985).

Although the Master's conclusion regarding the burden of proof was the focus of the Commonwealth's opening brief, we find it unnecessary to address the issue given our disposition of the case. Whatever the measure of proof, Massachusetts concedes that it bears the risk of nonpersuasion. See Brief for Defendant Massachusetts 7.

[7] See *United States* v. *California,* 381 U. S., at 161–167. See also *Alabama and Mississippi Boundary Case,* 470 U. S., at 98; *United States* v. *Maine (Rhode Island and New York Boundary Case),* 469 U. S. 504, 513

In this case, Massachusetts relies exclusively on the provision recognizing "historic bays," for it is agreed both that the United States has legitimately eschewed the straight baseline method for determining its boundaries,[9] and that Nantucket Sound does not qualify as a juridical bay. Because "historic bay" is not defined in the Convention, we have previously relied on a United Nations study authored by the U. N. Secretariat and entitled Juridical Regime of Historic Waters, Including Historical Bays, [1962] 2 Y. B. Int'l L. Comm'n 1, U. N. Doc. A/CN.4/143 (1962) (hereinafter Juridical Regime). See *United States* v. *Louisiana (Alabama and*

(1985); *United States* v. *Alaska*, 422 U. S. 184, 188–189 (1975); *Louisiana Boundary Case*, 394 U. S., at 35.

[8] See *Louisiana Boundary Case, id.*, at 21 (Convention contains "'the best and most workable definitions available'" (quoting *United States* v. *California*, 381 U. S., at 165)).

[9] We have previously held that the decision to use the straight baseline system provided for in Article 4 of the Convention rests with the Federal Government. See *Alabama and Mississippi Boundary Case*, 470 U. S., at 99; *Louisiana Boundary Case*, 394 U. S., at 72–73; *United States* v. *California*, 381 U. S., at 167–168.

Mississippi Boundary Case), 470 U. S. 93, 101–102 (1985). That study prescribes the three factors of dominion, continuity, and international acquiescence recognized in our own cases for identifying a "historic bay."[10] The Commonwealth submits that the three-part test is actually the standard for finding "historic *title*" and that a different doctrine—the doctrine of "ancient title"—is also a sufficient basis for identifying a "historic *bay*" under Article 7(6) of the Convention. According to Massachusetts, "historic title" is the maritime counterpart of title acquired by adverse possession. It is prescriptive in character because it arises as a result of a state's exercise of dominion over water that would otherwise constitute either high seas or territorial sea in which all ships enjoy the right of innocent passage. Before this Court, Massachusetts no longer claims "historic title" as it uses the term. Brief for Defendant Massachusetts 4; Reply Brief for Defendant Massachusetts 22.

The Commonwealth instead relies entirely on a claim of "ancient title." This is the first case in which we have been asked to evaluate such a claim to coastal waters. According to the Juridical Regime, an "ancient title" is based on a state's discovery and occupation of territory unclaimed by any other sovereign when it was first acquired. To claim "ancient title" to waters that would otherwise constitute high seas or territorial sea, a state must

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[10] "The term 'historic bay' is not defined in the Convention, and there is no complete accord as to its meaning. The Court has stated that a historic bay is a bay 'over which a coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations.' *United States* v. *California*, 381 U. S., at 172. See also *United States* v. *Alaska*, 422 U. S., at 189; *Louisiana Boundary Case*, 394 U. S., at 23. The Court also has noted that there appears to be general agreement that at least three factors are to be taken into consideration in determining whether a body of water is a historic bay: (1) the exercise of authority over the area by the claiming nation; (2) the continuity of this exercise of authority; and (3) the acquiescence of foreign nations. See *United States* v. *Alaska*, 422 U. S., at 189; *Louisiana Boundary Case*, 394 U. S., at 23–24, n. 27. An authoritative United Nations study concludes that these three factors require that 'the coastal State must have effectively exercised sovereignty over the area continuously during a time sufficient to create a usage and have done so under the general toleration of the community of States.' Juridical Regime of Historic Waters, Including Historic Bays 56, U. N. Doc. A/CN.4/143 (1962)." *Alabama and Mississippi Boundary Case*, 470 U. S., at 101–102 (footnotes omitted).

> "affir[m] that the occupation took place before the freedom of the high seas became part of international law. In that case, the State would claim acquisition of the area by an occupation which took place long ago. Strictly speaking, the State would, however, not assert a historic title, but rather an ancient title based on occupation as an original mode of acquisition of territory. The difference may be subtle but should in the interest of clarity not be overlooked: to base the title on occupation is to base it on a *clear original title which is fortified by long usage.*" Juridical Regime, at 12 (¶71) (emphasis added).

Assuming, *arguendo*, that waters that would otherwise be considered high seas or territorial sea may be claimed under a theory of "ancient title," both parties agree that effective "occupation" must have taken place before the freedom of the high seas became a part of international law. Tr. of Oral Arg. 16–17, 34; Brief for Defendant Massachusetts 4. By this analysis, the title must have been perfected no later than the latter half of the 18th century.[11]

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[11] One cannot, as a historical matter, point to a precise date on which the international community would have rejected an assertion of sovereignty over Nantucket Sound as contrary to international law. It is clear, however, that such a claim would have become progressively less tenable throughout the 18th century:

"The seventeenth century marked the heyday of the *mare clausum* (closed sea) with claims by England, Denmark, Spain, Portugal, Genoa, Tuscany, the Papacy, Turkey, and Venice.

"In the eighteenth century the position changed completely. Dutch policies had favoured freedom of navigation and fishing in the previous cen-

III

Although the Special Master discussed "the history of [Nantucket Sound], especially [its] role in the development of the colonial economy of Martha's Vineyard and Nantucket Island," Report 27, his discussion leaves us in doubt whether he felt that "the colonists' exploitation of the marine resources of the soun[d] was equivalent to a formal assumption of sovereignty over" it *before* freedom of the seas became generally recognized. *Id.*, at 58.[12] Because the Commonwealth relied on the same historical evidence to establish

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tury, and the great publicist Grotius had written against the Portuguese monopoly of navigation and commerce in the East Indies. After the accession of William of Orange to the English throne in 1689 English disputes with Holland over fisheries ceased. However, sovereignty of the sea was still asserted against France, and in general the formal requirement of the salute to the flag was maintained. By the late eighteenth century the claim to sovereignty was obsolete and the requirement of the flag ceremony was ended in 1805. After 1691 extensive Danish claims were reduced by stages to narrow fixed limits. By the late eighteenth century the cannon-shot rule predominated, and claims to large areas of sea faded away." L. Brownlie, Principles of Public International Law 233–234 (2d ed. 1973) (footnotes omitted).

"[I]t is an undeniable fact that, since the days of Grotius, the principle of the freedom of the high seas found an ever wider currency and that, after a gradual evolution, it gained the upper hand towards the beginning of the nineteenth century, when it crystallized into a universally accepted principle of international law." Y. Blum, Historic Titles in International Law § 61, pp. 242–243 (1965).

We find it unnecessary to select a "critical date" upon which the community of states would have rejected a British claim to Nantucket Sound. Because the colonists' activities changed gradually in character and intensity over time, we need say only that effective "occupation" must have ripened into "clear original title," "fortified by long usage," no later than the latter half of the 1700's.

[12] The Special Master discussed this history only as regards "historic" title, see Report 27, even though he recognized that "[e]ffective occupation, from a time prior to the victory of the doctrine of freedom of the seas" is necessary "to establish a valid claim to a body of water under ancient title," *id.*, at 25–26.

both "historic" and "ancient" title, and because "the ultimate responsibility for deciding what are correct findings of fact remains with us" in any event,[13] we have examined for ourselves the pertinent exhibits and transcripts. Our independent review leads us to conclude that the Commonwealth did not effectively "occupy" Nantucket Sound so as to obtain "clear original title" and fortify that title "by long usage" before the seas were recognized to be free.

Massachusetts relies on the colonists' "intensive and exclusive exploitation" of the marine resources of Nantucket Sound to establish occupation. Reply Brief for Defendant Massachusetts 17. At the outset, we have some difficulty appraising the Commonwealth's historical evidence because the cases and publications cited to us uniformly discuss occupation in the context of "historic" rather than "ancient" title. Assuming that the parties are correct in their unspoken assumption that occupation sufficient to establish "historic title" resembles that necessary to acquire "ancient title" as well, and further assuming that such title extends to the whole of the waters of the Sound and is not merely a right to exploit its resources, we believe that occupation requires, at a minimum, the existence of acts, attributable to the sovereign, manifesting an assertion of exclusive authority over the waters claimed.[14] The history of the two most publicized cases conveys the international understanding of occupation.

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[13] *Colorado* v. *New Mexico*, 467 U. S. 310, 317 (1984). See *Alabama and Mississippi Boundary Case*, 470 U. S., at 101, and cases cited therein.

[14] The Juridical Regime quotes two definitions of "occupation":

"[Occupation] is defined by Oppenheim as follows:

"'Occupation is the act of appropriation by a State by which it intentionally acquires sovereignty over such territory as is at the time not under the sovereignty of another State.'

"A similar definition is given by Fauchille:

"'Generally speaking, occupation is the taking by a State, with the intention of acting as the owner, of something which does not belong to any

In the *Fisheries Case (United Kingdom* v. *Norway),* 1951 I. C. J. 116, the Permanent International Court of Justice upheld Norway's use of straight baselines (now approved expressly by Article 7(6) of the Convention), in part because Norway had proved a historic claim to the "comparatively shallow" waters between the mainland and the fringing islands known as the Skjaergaard, or "rock rampart." The court acknowledged that Norwegian fishermen had exploited fishing grounds in this region "from time immemorial," *id.*, at 127, and that the King of Denmark and Norway had excluded fishermen from other states "for a long period, from 1616–1618 until 1906." *Id.*, at 124; see *id.*, at 142.

Of similar effect is the case of *Annakumaru Pillai* v. *Muthupayal,* 27 Indian L. R. Madras 551 (1903). The complainant in that case was a lessee of the Rajah of Ramnad who accused the defendant of stealing chanks (mollusks) from the seabed five miles off the Ramnad coast. The Indian High Court upheld its own jurisdiction and the liability of the defendant "upon the immemorial claim of the land sovereign over this body of water." P. Jessup, The Law of Territorial Waters and Maritime Jurisdiction 16 (1927) (footnote omitted). The Officiating Chief Judge, relying on historical evidence dating from the 6th century B.C. and explaining the concessions under which chanks and pearls were historically gathered by the state's licensees, declared that "it would be impossible to ignore the fact that for ages in this country, chanks and pearl oysters have been owned and enjoyed by the sovereign as belonging by prerogative right exclusively to him." 27 Indian L. R. Madras, at 557. "And [because] chanks as well as pearl oysters while still in the beds have always been taken to be the exclusive property of the sover-

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other State but which is susceptible of sovereignty.'" Juridical Regime, at 12 (¶ 70).

On the possible difference between occupation as a mode of original acquisition of territory as contrasted to occupation eventuating in prescriptive acquisition, see M. Strohl, The International Law of Bays 328, n. 27 (1963).

eign, . . . the fishery operations connected therewith have always been carried on under State control and have formed a source of revenue to the exchequer." *Id.*, at 554. The Officiating Chief Judge concluded that this history demonstrated "exclusive occupation" of "the fisheries in question." *Id.*, at 566.[15]

We have encountered additional examples of claims to title based on exploitation of marine resources—the pearl fisheries in Australia, Mexico, and Columbia, the oyster beds in the Bay of Granville and off the Irish Coast, the coral beds off the coasts of Algeria, Sardinia, and Sicily, and various grounds in which herring, among other fishes, are found. See T. Fulton, The Sovereignty of the Sea 696–698 (1976 reprint of 1911 ed.). The continuation of apparently longstanding state regulation over these fisheries does not contradict, and is indeed perfectly consistent with, the understanding of occupation reflected in the Norwegian and Indian cases just discussed.

In contrast, the historical evidence introduced by Massachusetts does not show effective occupation of Nantucket Sound. To be sure, the Commonwealth's expert witness on the history of the Sound, Dr. Louis DeVorsey, a historical geographer, did conclude that Nantucket Sound was part of an "amphibious resource region" because of the "intimate relationship" between the inhabitants of the area and the surrounding waters.[16] By this Dr. DeVorsey meant essentially that the residents took their livelihood from the sea. Although fascinating from a historical geographer's point of interest, the testimony of Dr. DeVorsey and the exhibits introduced through him do not satisfy the legal threshold for occupation of a coastal water body.

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[15] Because of a division of opinion between the Officiating Chief Judge and the second judge on the two-judge panel, the case was subsequently heard by a three-judge panel. The later panel unanimously agreed with the judgment of the Officiating Chief Judge and with his historical analysis. See *Annakumaru Pillai* v. *Muthupayal*, 27 Indian L. R. Madras, at 572.

[16] Dr. DeVorsey inferred this intimate relationship in part from 17th- and 18th-century maps naming prominent features and attempting to chart the depths of Nantucket Sound. As Dr. DeVorsey acknowledged, however, none of these maps identified Nantucket Sound as a separate body of water even though they did identify other bodies of water such as Cape Cod Bay, Buzzard's Bay, and, in two instances, Vineyard Sound. These

To begin with, the opinion that Nantucket Sound formed part of an "amphibious resource region" does not prove occupation of the entirety of Nantucket Sound. That conclusion was based largely on activity which undoubtedly took place either within territorial waters or on dry land. For example, to evidence the colonists' close relationship with the sea, Dr. DeVorsey pointed to the use of sand for glassmaking, stone polishing, and farming. Other activities, such as the building of mills powered by the tide, the making of salt from seawater, and the gathering of seaweed for fertilizer and insulation, also fail to establish occupation of Nantucket Sound. Even considering this evidence together with the more water-based pursuits of harvesting oysters and clams and hunting whales, we do not find sufficient evidence of occupation of Nantucket Sound as a whole. Massachusetts concedes that oysters were dug mainly in the harbors, and for decades the colonists' exploitation of whales was restricted to those that had drifted onto the beach. Although the residents by the mid-18th century had developed a technique for driving whales onto beaches by pursuing them in modified four- to five-man Indian canoes, and they certainly caught shellfish and clams outside the shallow water near shore, there is no satisfactory evidence that these activities occurred over the entirety of Nantucket Sound, and in particular over the portion of the Sound which the United States contends is high seas.

The evidence of occupation adduced by Massachusetts is also deficient because it does not warrant a finding that the

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early maps do not support Massachusetts' contention that the area's inhabitants established a special relationship with the protected waters of Nantucket Sound as opposed to the surrounding waters and ocean in general.

colonists asserted any exclusive right to the waters of Nantucket Sound. The closest the Commonwealth comes is a 1672 contract by which the town of Nantucket attempted to engage a whaler by the name of Lopar to "follow the trade of whaling on the island" for two years in exchange for, *inter alia*, an exclusive license to hunt whales and 10 acres of land. There is no evidence that the contract was carried out (and in particular no record of a conveyance of real property), and no suggestion in the contract that the license was limited, or even especially concerned with, whaling in Nantucket Sound. Indeed, the contract does not clearly reflect an exclusive proprietary interest in whales anywhere: it may simply represent a covenant on the part of the Nantucket islanders not to compete with the whaling company or companies chartered under the proposed contract. The only other evidence of an assertion of exclusive control was a 1692 Colonial Resolve to build a vessel to protect coastal ships in Vineyard Sound against the depredations of New Yorkers, with whom a dispute was brewing at the time.[17] But this evidence concerning Vineyard Sound merely highlights the lack of any comparable evidence concerning Nantucket Sound. In the absence of evidence limiting use of Nantucket Sound to the inhabitants of its shores, there is no reason to exempt these waters from such rights as innocent passage traditionally enjoyed in common by all members of the international polity.

Even if Massachusetts had introduced evidence of intensive and exclusive exploitation of the entirety of Nantucket Sound, we would still be troubled by the lack of any linkage between these activities and the English Crown. Cf. *United States* v. *Alaska*, 422 U. S. 184, 190–191, 203 (1975). Unless we are to believe that the self-interested endeavors of every seafaring community suffice to establish "ancient title" to the waters containing the fisheries and resources it exploits, without regard to continuity of usage or international acquiescence necessary to establish "historic title," solely because exploitation predated the freedom of the seas, then the Commonwealth's claim cannot be recognized. Accordingly, we find that the colonists of Nantucket Sound did not effectively occupy that body of water; as a consequence, Great Britain did not obtain title which could devolve upon Massachusetts.

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[17] The dispute was resolved peacefully, there is no evidence that the vessel was built, and the only other patrol vessel about which Dr. DeVorsey testified was engaged in convoying merchantmen, not in protecting Nantucket Sound.

IV

Our determination that Massachusetts had not established clear title prior to freedom of the seas is corroborated by the Commonwealth's consistent failure to assert dominion over Nantucket Sound since that time.[18] Three examples should suffice to demonstrate that during the 18th and 19th centuries Massachusetts continued to treat Nantucket Sound in a manner inconsistent with its recent characterization of that body as internal waters.

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[18] See *Temple of Preah Vihear*, 1962 I. C. J. 6, 61 (separate opinion of Sir Gerald Fitzmaurice) ("It is a general principle of law . . . that a party's attitude, state of mind or intentions at a later date can be regarded as good evidence—in relation to the same or a closely connected matter—of his attitude, state of mind or intentions at an earlier date also; . . . the existence of a state of fact, or of a situation, at a later date, may furnish good presumptive evidence of its existence at an earlier date also, even where the later situation or state of affairs has in other respects to be excluded from consideration" (citations omitted)).

While the position of Massachusetts is discussed in text, it bears mention that the United States did not assert sovereignty over Nantucket Sound either. In 1789 the First Congress established a customs enforcement system, which included a number of separate districts in Massachusetts. The statutory definition of the district of Nantucket included "the island of Nantucket" without any reference to adjacent waters, whereas the district of Edgartown, which included Martha's Vineyard and the Elizabeth Islands, expressly incorporated "all the waters and shores" within Duke's County. Act of July 31, 1789, 1 Stat. 31. This distinction was repeated in subsequent legislation in 1790, Act of Aug. 4, 1790, 1 Stat. 146, and in 1799, Act of Mar. 2, 1799, 1 Stat. 629.

First, in 1847, the Supreme Judicial Court of Massachusetts issued an opinion which is generally understood as having adopted Lord Coke's more demanding version of the line-of-sight test for determining whether jaws of land enclosed inland waters.[19] Since it is agreed that Nantucket Sound could not qualify as inland waters under the Coke test, the Court's decision that that test was part of the common law of Massachusetts supports the further conclusion that the Sound was not part of the internal waters of the Commonwealth.

This conclusion was confirmed in 1859 when the Massachusetts Legislature enacted a statute defining the seaward boundary of the Commonwealth at one marine league (or three nautical miles) from the coast. See Acts of 1859, Ch. 289, Mass. Ex. 53. In accordance with this measure, the statute treated arms of the sea as part of the Commonwealth if the distance between their headlands did not exceed two marine leagues. Thus, the statute replaced the ambiguous line-of-sight test for applying the *inter fauces terrae* doctrine with a fixed standard of six nautical miles. Since the distance between Monomoy Point and Nantucket Island is admittedly more than six nautical miles, Massachusett's statutory definition of its own coastline excluded Nantucket Sound.

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[19] In *Commonwealth* v. *Peters*, 53 Mass. 387, 392 (1847), the Massachusetts high court held:

"All creeks, havens, coves, and inlets lying within projecting headlands and islands, and all bays and arms of the sea lying within and between lands not so wide but that persons and objects on the one side can be discerned by the naked eye by persons on the opposite side, are taken to be within the body of the county."

Chief Judge Shaw's adoption of the Coke test in *Peters* is consistent with Judge Story's earlier exposition in *United States* v. *Grush*, 26 F. Cas. 48, 52 (No. 15,268) (CC Mass. 1829):

"I do not understand by this expression, that it is necessary, that the shores should be so near, that all that is done on one shore could be discerned, and testified to with certainty, by persons standing on the opposite shore; but that objects on the opposite shore might be reasonably discerned, that is, might be distinctly seen with the naked eye, and clearly distinguished from each other."

The parties do not disagree with the Master's conclusion that the American view of the proper test, which followed Coke, differed from the British view, which followed Hale.

Finally, in 1881, the Massachusetts Legislature enacted a statute directing its Harbor and Land Commission to prepare charts identifying the boundaries that had been established by the 1859 law. Official charts prepared pursuant to that legislation are consistent with the Master's conclusion that Vineyard Sound was considered part of the Commonwealth, but that Nantucket Sound was not.

It was not until 1971 that Massachusetts first asserted its claim to jurisdiction over Nantucket Sound. There is simply no evidence that the English Crown or its colonists had obtained "clear original title" to the Sound in the 17th century, or that such title was "fortified by long usage." Without such evidence, we are surely not prepared to enlarge the exception in Article 7(6) of the Convention for historic bays to embrace a claim of "ancient title" like that advanced in this case.[20]

The parties are directed to prepare and submit a decree conforming to the recommendations of the Special Master.

It is so ordered.

JUSTICE MARSHALL took no part in the consideration or decision of this case.

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[20] The validity of and any limits to the "ancient title" theory are accordingly reserved for an appropriate case. In view of our decision that the history of Nantucket Sound does not support the acquisition of "ancient title" by Massachusetts, we similarly decline to address the question whether the Commonwealth abandoned or renounced that title, and the antecedent issue of under what standard that judgment should be made.

NEW YORK *v.* CLASS

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 84-1181. Argued November 4, 1985—Decided February 25, 1986

When two New York City police officers observed respondent driving above the speed limit in a car with a cracked windshield, both traffic violations under New York law, they stopped him. He then emerged from the car and approached one of the officers. The other officer opened the car door to look for the Vehicle Identification Number (VIN), which is located on the left doorjamb in pre-1969 automobiles. When the officer did not find the VIN on the doorjamb, he reached into the car's interior to move some papers obscuring the area of the dashboard where the VIN is located on later model automobiles. In doing so, the officer saw the handle of a gun protruding from underneath the driver's seat and seized the gun. Respondent was then arrested. After the state trial court denied a motion to suppress the gun as evidence, respondent was convicted of criminal possession of a weapon. The Appellate Division of the New York Supreme Court upheld the conviction, but the New York Court of Appeals reversed, holding that in the absence of any justification for the search of respondent's car besides the traffic violations, the search was prohibited and the gun must accordingly be excluded from evidence.

Held:

1. The New York Court of Appeals' decision did not rest on an adequate and independent state ground so as to deprive this Court of jurisdiction. The Court of Appeals' opinion, which mentions the New York Constitution only once and then in direct conjunction with the Federal Constitution and which makes use of both federal and New York cases in its analysis, lacks the requisite "plain statement" that it rests on state grounds. Moreover, in determining that the search in question was prohibited, the court looked to the Federal Constitution and not to a state statute that authorizes officers to demand that drivers reveal their VIN, merely holding that that statute provided no justification for a search. Pp. 109–110.

2. The police officer's action in searching respondent's car did not violate the Fourth Amendment. Pp. 111–119.

(a) Because of the important role played by the VIN in the pervasive governmental regulation of automobiles and the efforts by the Federal Government through regulations to assure that the VIN is placed in plain view, respondent had no reasonable expectation of privacy in the

VIN. The placement of the papers obscuring the VIN was insufficient to create a privacy interest in the VIN. Pp. 111–114.

(b) The officer's search was sufficiently unintrusive to be constitutionally permissible in light of respondent's lack of a reasonable expectation of privacy in the VIN, the fact that the officers observed respondent commit two traffic violations, and concerns for the officers' safety. Pp. 114–119.

63 N. Y. 2d 491, 472 N. E. 2d 1009, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined, and in Part II of which BRENNAN, MARSHALL, and STEVENS, JJ., joined. POWELL, J., filed a concurring opinion, in which BURGER, C. J., joined, *post*, p. 120. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL and STEVENS, JJ., joined, *post*, p. 122. WHITE, J., filed a dissenting opinion, in which STEVENS, J., joined, *post*, p. 131.

Steven R. Kartagener argued the cause for petitioner. With him on the briefs was *Mario Merola*.

Marc C. Cogan argued the cause *pro hac vice* for respondent. With him on the brief was *William E. Hellerstein*.*

JUSTICE O'CONNOR delivered the opinion of the Court.

In this case, we must decide whether, in order to observe a Vehicle Identification Number (VIN) generally visible from outside an automobile, a police officer may reach into the passenger compartment of a vehicle to move papers obscuring the VIN after its driver has been stopped for a traffic violation and has exited the car. We hold that, in these circumstances, the police officer's action does not violate the Fourth Amendment.

I

On the afternoon of May 11, 1981, New York City police officers Lawrence Meyer and William McNamee observed re-

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**Fred E. Inbau, Wayne W. Schmidt, James P. Manak, David Crump, Daniel B. Hales, James Murphy*, and *Francis B. Looney* filed a brief for Americans for Effective Law Enforcement, Inc., et al. as *amici curiae* urging reversal.

spondent Benigno Class driving above the speed limit in a car with a cracked windshield. Both driving with a cracked windshield and speeding are traffic violations under New York law. See N. Y. Veh. & Traf. Law §§ 375(22), 1180(d) (McKinney 1970). Respondent followed the officers' ensuing directive to pull over. Respondent then emerged from his car and approached Officer Meyer. Officer McNamee went directly to respondent's vehicle. Respondent provided Officer Meyer with a registration certificate and proof of insurance, but stated that he had no driver's license.

Meanwhile, Officer McNamee opened the door of respondent's car to look for the VIN, which is located on the left doorjamb in automobiles manufactured before 1969. When the officer did not find the VIN on the doorjamb, he reached into the interior of respondent's car to move some papers obscuring the area of the dashboard where the VIN is located in later model automobiles. In doing so, Officer McNamee saw the handle of a gun protruding about one inch from underneath the driver's seat. The officer seized the gun, and respondent was promptly arrested. Respondent was also issued summonses for his traffic violations.

It is undisputed that the police officers had no reason to suspect that respondent's car was stolen, that it contained contraband, or that respondent had committed an offense other than the traffic violations. Nor is it disputed that respondent committed the traffic violations with which he was charged, and that, as of the day of the arrest, he had not been issued a valid driver's license.

After the state trial court denied a motion to suppress the gun as evidence, respondent was convicted of criminal possession of a weapon in the third degree. See N. Y. Penal Law § 265.02(4) (McKinney 1980). The Appellate Division of the New York Supreme Court upheld the conviction without opinion. 97 App. Div. 2d 741, 468 N. Y. S. 2d 892 (1983). The New York Court of Appeals reversed. It reasoned that the police officer's "intrusion . . . was undertaken to obtain information and it exposed . . . hidden areas" of the car, and "therefore constituted a search." 63 N. Y. 2d 491, 495, 472 N. E. 2d 1009, 1011 (1984). Although it recognized that a search for a VIN generally involves a minimal intrusion because of its limited potential locations, and agreed that there is a compelling law enforcement interest in positively identifying vehicles involved in accidents or automobile thefts, the court thought it decisive that the facts of this case "reveal no reason for the officer to suspect other criminal activity [besides the traffic infractions] or to act to protect his own safety." *Id.*, at 495–496, 472 N. E. 2d, at 1012. The state statutory provision that authorizes officers to demand that drivers reveal their VIN "provided no justification for the officer's entry of [respondent's] car." *Id.*, at 497, 472 N. E. 2d, at 1013. If the officer had taken advantage of that statute and asked to see the VIN, respondent could have moved the papers away himself and no intrusion would have occurred. In the absence of any justification for the search besides the traffic infractions, the New York Court of Appeals ruled that the gun must be excluded from evidence.

We granted certiorari, 471 U. S. 1003 (1985), and now reverse.

II

Respondent asserts that this Court is without jurisdiction to hear this case because the decision of the New York Court of Appeals rests on an adequate and independent state ground. We disagree.

The opinion of the New York Court of Appeals mentions the New York Constitution but once, and then only in direct conjunction with the United States Constitution. 63 N. Y. 2d, at 493, 472 N. E. 2d, at 1010. Cf. *Michigan* v. *Long*, 463 U. S. 1032, 1043 (1983). The opinion below makes use of both federal and New York cases in its analysis, generally citing both for the same proposition. See, *e. g.*, 63 N. Y. 2d, at 494, 495, 472 N. E. 2d, at 1011. The opinion lacks the requisite "plain statement" that it rests on state grounds.

Michigan v. *Long*, *supra*, at 1042, 1044. Accordingly, our holding in *Michigan* v. *Long* is directly applicable here:

> "[W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." 463 U. S., at 1040–1041.

See also *California* v. *Carney*, 471 U. S. 386, 389, n. 1 (1985).

Respondent's claim that the opinion below rested on independent and adequate state *statutory* grounds is also without merit. The New York Court of Appeals did not hold that §401 of New York's Vehicle and Traffic Law prohibited the search at issue here, but, in rejecting an assertion of petitioner, merely held that §401 "provided no *justification*" for a search. 63 N. Y. 2d, at 497, 472 N. E. 2d, at 1013 (emphasis added). In determining that the police officer's action was prohibited, the court below looked to the Federal Constitution, not the State's statute. Moreover, New York adheres to the general rule that, when statutory construction can resolve a case, courts should not decide constitutional issues. See *Ashwander* v. *TVA*, 297 U. S. 288, 346–347 (1936) (Brandeis, J., concurring); *In re Peters* v. *New York City Housing Authority*, 307 N. Y. 519, 527, 121 N. E. 2d 529, 531 (1954). Since the New York Court of Appeals discussed both statutory and constitutional grounds, we may infer that the court believed the statutory issue insufficient to resolve the case. The discussion of the statute therefore could not have constituted an independent and adequate state ground.

III

A

The officer here, after observing respondent commit two traffic violations and exit the car, attempted to determine the VIN of respondent's automobile. In reaching to remove papers obscuring the VIN, the officer intruded into the passenger compartment of the vehicle.

The VIN consists of more than a dozen digits, unique to each vehicle and required on all cars and trucks. See 49 CFR § 571.115 (1984). The VIN is roughly analogous to a serial number, but it can be deciphered to reveal not only the place of the automobile in the manufacturer's production run, but also the make, model, engine type, and place of manufacture of the vehicle. See § 565.4.

The VIN is a significant thread in the web of regulation of the automobile. See generally 43 Fed. Reg. 2189 (1978). The ease with which the VIN allows identification of a particular vehicle assists the various levels of government in many ways. For the Federal Government, the VIN improves the efficacy of recall campaigns, and assists researchers in determining the risks of driving various makes and models of automobiles. In combination with state insurance laws, the VIN reduces the number of those injured in accidents who go uncompensated for lack of insurance. In conjunction with the State's registration requirements and safety inspections, the VIN helps to ensure that automobile operators are driving safe vehicles. By making automobile theft more difficult, the VIN safeguards not only property but also life and limb. See 33 Fed. Reg. 10207 (1968) (noting that stolen vehicles are disproportionately likely to be involved in automobile accidents).

To facilitate the VIN's usefulness for these laudable governmental purposes, federal law requires that the VIN be placed in the plain view of someone *outside* the automobile:

> "The VIN for passenger cars [manufactured after 1969] shall be located inside the passenger compartment. It shall be readable, without moving any part of the vehicle, through the vehicle glazing under daylight lighting conditions by an observer having 20/20 vision (Snellen) whose eye point is located *outside the vehicle* adjacent to the left windshield pillar. Each character in the VIN subject to this paragraph shall have a minimum height of 4 mm." 49 CFR §571.115 (S4.6) (1984) (emphasis added).

In *Delaware* v. *Prouse*, 440 U. S. 648, 658 (1979), we recognized the "vital interest" in highway safety and the various programs that contribute to that interest. In light of the important interests served by the VIN, the Federal and State Governments are amply justified in making it a part of the web of pervasive regulation that surrounds the automobile, and in requiring its placement in an area ordinarily in plain view from outside the passenger compartment.

B

A citizen does not surrender all the protections of the Fourth Amendment by entering an automobile. See *Delaware* v. *Prouse, supra,* at 663; *Almeida-Sanchez* v. *United States*, 413 U. S. 266, 269 (1973). Nonetheless, the State's intrusion into a particular area, whether in an automobile or elsewhere, cannot result in a Fourth Amendment violation unless the area is one in which there is a "constitutionally protected reasonable expectation of privacy." *Katz* v. *United States*, 389 U. S. 347, 360 (1967) (Harlan, J., concurring). See *Oliver* v. *United States*, 466 U. S. 170, 177–180 (1984); *Maryland* v. *Macon*, 472 U. S. 463, 469 (1985).

The Court has recognized that the physical characteristics of an automobile and its use result in a lessened expectation of privacy therein:

> "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom

> serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view." *Cardwell* v. *Lewis*, 417 U. S. 583, 590 (1974) (plurality opinion).

Moreover, automobiles are justifiably the subject of pervasive regulation by the State. Every operator of a motor vehicle must expect that the State, in enforcing its regulations, will intrude to some extent upon that operator's privacy:

> "Automobiles, unlike homes, are subject to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order." *South Dakota* v. *Opperman*, 428 U. S. 364, 368 (1976).

See also *Cady* v. *Dombrowski*, 413 U. S. 433, 441–442 (1973); *California* v. *Carney*, 471 U. S., at 392.

The factors that generally diminish the reasonable expectation of privacy in automobiles are applicable *a fortiori* to the VIN. As we have discussed above, the VIN plays an important part in the pervasive regulation by the government of the automobile. A motorist must surely expect that such regulation will on occasion require the State to determine the VIN of his or her vehicle, and the individual's reasonable expectation of privacy in the VIN is thereby diminished. This is especially true in the case of a driver who has committed a traffic violation. See *Delaware* v. *Prouse*, *supra*, at 659 ("The foremost method of enforcing traffic and vehicle safety regulations . . . is acting upon observed violations. *Vehicle stops for traffic violations occur countless times each day; and on these occasions, licenses and registration papers are subject to inspection and drivers without them will be as-*

certained") (emphasis added). In addition, it is unreasonable to have an expectation of privacy in an object required by law to be located in a place ordinarily in plain view from the exterior of the automobile. The VIN's mandated visibility makes it more similar to the exterior of the car than to the trunk or glove compartment. The exterior of a car, of course, is thrust into the public eye, and thus to examine it does not constitute a "search." See *Cardwell* v. *Lewis*, *supra*, at 588–589. In sum, because of the important role played by the VIN in the pervasive governmental regulation of the automobile and the efforts by the Federal Government to ensure that the VIN is placed in plain view, we hold that there was no reasonable expectation of privacy in the VIN.

We think it makes no difference that the papers in respondent's car obscured the VIN from the plain view of the officer. We have recently emphasized that efforts to restrict access to an area do not generate a reasonable expectation of privacy where none would otherwise exist. See *Oliver* v. *United States*, *supra*, at 182–184 (placement of "No Trespassing" signs on secluded property does not create "legitimate privacy interest" in marihuana fields). Here, where the object at issue is an identification number behind the transparent windshield of an automobile driven upon the public roads, we believe that the placement of the obscuring papers was insufficient to create a privacy interest in the VIN. The mere viewing of the formerly obscured VIN was not, therefore, a violation of the Fourth Amendment.

C

The evidence that respondent sought to have suppressed was not the VIN, however, but a gun, the handle of which the officer saw from the interior of the car while reaching for the papers that covered the VIN. While the interior of an automobile is not subject to the same expectations of privacy that exist with respect to one's home, a car's interior as a whole is nonetheless subject to Fourth Amendment protection from unreasonable intrusions by the police. We agree with the New York Court of Appeals that the intrusion into that space constituted a "search." 63 N. Y. 2d, at 495, 472 N. E. 2d, at 1011. Cf. *Delaware* v. *Prouse*, 440 U. S., at 653 ("[S]topping an automobile and detaining its occupants constitute a 'seizure' . . . even though the purpose of the stop is limited and the resulting detention quite brief"). We must decide, therefore, whether this search was constitutionally permissible.

If respondent had remained in the car, the police would have been justified in asking him to move the papers obscuring the VIN. New York law authorizes a demand by officers to see the VIN, see 63 N. Y. 2d, at 496–497, 472 N. E. 2d, at 1012–1013, and even if the state law were not explicit on this point we have no difficulty in concluding that a demand to inspect the VIN, like a demand to see license and registration papers, is within the scope of police authority pursuant to a traffic violation stop. See *Prouse, supra,* at 659. If respondent had stayed in his vehicle and acceded to such a request from the officer, the officer would not have needed to intrude into the passenger compartment. Respondent chose, however, to exit the vehicle without removing the papers that covered the VIN; the officer chose to conduct his search without asking respondent to return to the car. We must therefore decide whether the officer acted within the bounds of the Fourth Amendment in conducting the search. We hold that he did.

Keeping the driver of a vehicle in the car during a routine traffic stop is probably the typical police practice. See D. Schultz & D. Hunt, Traffic Investigation and Enforcement 17 (1983). Nonetheless, out of a concern for the safety of the police, the Court has held that officers may, consistent with the Fourth Amendment, exercise their discretion to require a driver who commits a traffic violation to exit the vehicle even though they lack any particularized reason for believing the driver possesses a weapon. *Pennsylvania* v. *Mimms*, 434

U. S. 106, 108–111 (1977) *(per curiam)*. While we impute to respondent no propensity for violence, and while we are conscious of the fact that respondent here voluntarily left the vehicle, the facts of this case may be used to illustrate one of the principal justifications for the discretion given police officers by *Pennsylvania* v. *Mimms:* while in the driver's seat, respondent had a loaded pistol at hand. *Mimms* allows an officer to guard against that possibility by requiring the driver to exit the car briefly. Clearly, *Mimms* also allowed the officers here to detain respondent briefly outside the car that he voluntarily exited while they completed their investigation.

The question remains, however, as to whether the officers could not only effect the seizure of respondent necessary to detain him briefly outside the vehicle, but also effect a search for the VIN that may have been necessary only because of that detention. The pistol beneath the seat did not, of course, disappear when respondent closed the car door behind him. To have returned respondent immediately to the automobile would have placed the officers in the same situation that the holding in *Mimms* allows officers to avoid—permitting an individual being detained to have possible access to a dangerous weapon and the benefit of the partial concealment provided by the car's exterior. See *Pennsylvania* v. *Mimms*, *supra*, at 110. In light of the danger to the officers' safety that would have been presented by returning respondent immediately to his car, we think the search to obtain the VIN was not prohibited by the Fourth Amendment.

The Fourth Amendment by its terms prohibits "unreasonable" searches and seizures. We have noted:

> "[T]here is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.' *Camara* v. *Municipal Court*, 387 U. S. 523, 534–535, 536–537 (1967). And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with

> rational inferences from those facts, justifiably warrant that intrusion." *Terry* v. *Ohio*, 392 U. S. 1, 21 (1968) (footnote omitted) (brackets as in *Terry*).

This test generally means that searches must be conducted pursuant to a warrant backed by probable cause. See *United States* v. *Ventresca*, 380 U. S. 102, 105–109 (1965); *United States* v. *Karo*, 468 U. S. 705, 714–715 (1984). When a search or seizure has as its immediate object a search for a weapon, however, we have struck the balance to allow the weighty interest in the safety of police officers to justify warrantless searches based only on a reasonable suspicion of criminal activity. See *Terry* v. *Ohio*, *supra; Adams* v. *Williams*, 407 U. S. 143 (1972). Such searches are permissible despite their substantial intrusiveness. See *Terry* v. *Ohio*, *supra*, at 24–25 (search was "a severe, though brief, intrusion upon cherished personal security, and . . . must surely [have] b[een] an annoying, frightening, and perhaps humiliating experience").

When the officer's safety is less directly served by the detention, something more than objectively justifiable suspicion is necessary to justify the intrusion if the balance is to tip in favor of the legality of the governmental intrusion. In *Pennsylvania* v. *Mimms*, *supra*, at 107, the officers had personally observed the seized individual in the commission of a traffic offense before requesting that he exit his vehicle. In *Michigan* v. *Summers*, 452 U. S. 692, 693 (1981), the officers had obtained a warrant to search the house that the person seized was leaving when they came upon him. While the facts in *Pennsylvania* v. *Mimms* and *Michigan* v. *Summers* differ in some respects from the facts of this case, the similarities are strong enough that the balancing of governmental interests against governmental intrusion undertaken in those cases is also appropriate here. All three of the factors involved in *Mimms* and *Summers* are present in this case: the safety of the officers was served by the governmental intrusion; the intrusion was minimal; and the search stemmed from some probable cause focusing suspicion on the individual affected by the search. Indeed, here the officers' probable cause stemmed from directly observing respondent commit a violation of the law.

When we undertake the necessary balancing of "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion," *United States* v. *Place*, 462 U. S. 696, 703 (1983), the conclusion that the search here was permissible follows. As we recognized in *Delaware* v. *Prouse*, 440 U. S., at 658, the governmental interest in highway safety served by obtaining the VIN is of the first order, and the particular method of obtaining the VIN here was justified by a concern for the officers' safety. The "critical" issue of the intrusiveness of the government's action, *United States* v. *Place*, *supra*, at 722 (BLACKMUN, J., concurring in judgment), also here weighs in favor of allowing the search. The search was focused in its objective and no more intrusive than necessary to fulfill that objective. The search was far less intrusive than a formal arrest, which would have been permissible for a traffic offense under New York law, see N. Y. Veh. & Traf. Law § 155 (McKinney Supp. 1986); N. Y. Crim. Proc. Law § 140.10(1) (McKinney 1981), and little more intrusive than a demand that respondent—under the eyes of the officers—move the papers himself. The VIN, which was the clear initial objective of the officer, is by law present in one of two locations—either inside the doorjamb, or atop the dashboard and thus ordinarily in plain view of someone outside the automobile. Neither of those locations is subject to a reasonable expectation of privacy. The officer here checked both those locations, and only those two locations. The officer did not root about the interior of respondent's automobile before proceeding to examine the VIN. He did not reach into any compartments or open any containers. He did not even intrude into the interior at all until after he had checked the doorjamb for the VIN. When he did intrude, the officer simply reached directly for the unprotected space where the VIN was located to move the offending papers. We hold that this search was sufficiently unintrusive to be constitutionally permissible in light of the lack of a reasonable expectation of privacy in the VIN and the fact that the officers observed respondent commit two traffic violations. Any other conclusion would expose police officers to potentially grave risks without significantly reducing the intrusiveness of the ultimate conduct—viewing the VIN—which, as we have said, the officers were entitled to do as part of an undoubtedly justified traffic stop.

We note that our holding today does not authorize police officers to enter a vehicle to obtain a dashboard-mounted VIN when the VIN is visible from outside the automobile. If the VIN is in the plain view of someone outside the vehicle, there is no justification for governmental intrusion into the passenger compartment to see it.*

The judgment of the New York Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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*Petitioner invites us to hold that respondent's status as an unlicensed driver deprived him of any reasonable expectations of privacy in the vehicle, because the officers would have been within their discretion to have prohibited respondent from driving the car away, to have impounded the car, and to have later conducted an inventory search thereof. Cf. *South Dakota* v. *Opperman*, 428 U. S. 364 (1976) (police may conduct inventory search of car impounded for multiple parking violations); *Nix* v. *Williams*, 467 U. S. 431 (1984) (discussing the "inevitable discovery" exception to the exclusionary rule). Petitioner also argues that there can be no Fourth Amendment violation here because the police could have arrested respondent, see N. Y. Veh. & Traf. Law § 155 (McKinney Supp. 1986); N. Y. Crim. Proc. Law § 140.10(1) (McKinney 1981), and could then have searched the passenger compartment at the time of arrest, cf. *New York* v. *Belton*, 453 U. S. 454 (1981), or arrested respondent and searched the car after impounding it pursuant to the arrest, see *Cady* v. *Dombrowski*, 413 U. S. 433 (1973). We do not, however, reach those questions here.

JUSTICE POWELL, with whom THE CHIEF JUSTICE joins, concurring.

I join the Court's opinion but write to emphasize that, because of the unique and important governmental interests served by inspection of the Vehicle Identification Number (VIN), an officer making a lawful stop of a vehicle has the right and duty to inspect the VIN. Where the VIN is not visible from outside the vehicle or voluntarily disclosed by the driver, the officer may enter the vehicle to the extent necessary to read the VIN.

As the Court explains, the VIN essentially is a serial number that, by identifying certain features of the vehicle to which it is affixed, provides an effective and reliable means for positive identification of the vehicle. The VIN occupies a central position in the elaborate federal and state regulation of automobiles, which frequently depends on such positive identification. Federal regulations now direct manufacturers to place the VIN in a location where it is in the plain view of an observer standing outside the vehicle. 49 CFR §571.115 (S4.6) (1984).

The Court has answered correctly the question presented in this case by applying conventional Fourth Amendment analysis. I believe, however, that an officer's efforts to observe the VIN need not be subjected to the same scrutiny that courts properly apply when police have intruded into a vehicle to arrest or to search for evidence of crime. When an officer lawfully has stopped a motor vehicle for a traffic infraction, the officer is entitled to inspect license and registration documents. See *Delaware* v. *Prouse*, 440 U. S. 648 (1979); *Pennsylvania* v. *Mimms*, 434 U. S. 106 (1977) *(per curiam)*. Unquestionably, the officer also may look through the windshield, observe the VIN, and record it without implicating any Fourth Amendment concerns. Respondent does not contend, nor could it reasonably be contended, that such action violates the Federal Constitution. The question raised on the facts of this case, therefore, is whether the

Fourth Amendment was offended by the incremental intrusion resulting from the officer's efforts to observe this VIN once respondent's vehicle lawfully was stopped. Cf. *Pennsylvania* v. *Mimms*, *supra*, at 109.

The problem for the officer was that the VIN, located on the dashboard just behind the windshield, was obscured by papers. The sequence of events that transpired is well stated in the Court's opinion. Suffice it to say here that, when respondent left his vehicle to talk to one of the officers, the other officer sought to determine the VIN of the automobile. This officer did what his duty required. Because he could not see the VIN from outside the car, and because the driver had exited the vehicle, the officer entered the car to the extent necessary to move the papers covering the VIN. It was only then that he observed a handgun protruding from beneath the front seat. The Court of Appeals of New York held that this intrusion was an unlawful search. While agreeing that a search occurred, this Court today sustains the officer's action on reasoning familiar in cases applying Fourth Amendment principles to automobiles.

In my view, the Fourth Amendment question may be stated simply as whether the officer's efforts to inspect the VIN were reasonable. There is no finding in this case that the officer's entry into respondent's vehicle—opening the door and reaching his hand to the dashboard—was not reasonably necessary to achieve his lawful purpose. If respondent had remained in his seat, as the Court observes, the officer properly should have requested him to remove the papers obstructing the VIN. In the absence of compliance with such a request, an arrest would have been lawful. Cf. *People* v. *Ellis*, 62 N. Y. 2d 393, 465 N. E. 2d 826 (1984) (on lawful traffic stop, officers properly arrested driver for failure to produce license or other identification).

In view of the important public purposes served by the VIN system and the minimal expectation of privacy in the VIN, I would hold that where a police officer lawfully stops a motor vehicle, he may inspect the VIN, and remove any obstruction preventing such inspection, where the driver of the vehicle either is unwilling or unable to cooperate.*

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE STEVENS join, concurring in part and dissenting in part.

I agree that the decision of the New York Court of Appeals does not rest on an adequate and independent state ground, see *Michigan* v. *Long*, 463 U. S. 1032, 1043 (1983), and therefore join Part II of the Court's opinion. I also agree that the police conducted a *search* of respondent's vehicle to inspect the Vehicle Identification Number (VIN). *Ante*, at 114–115. However, I disagree that this *search* was constitutionally permissible, and to that extent respectfully dissent.

I

The facts bear repetition. Officers Meyer and McNamee pulled respondent over after observing him commit minor traffic violations. Respondent emerged from his car, closed the door, and joined Officer Meyer at the rear of the vehicle. Respondent gave Officer Meyer his car registration certificate and proof of insurance, but did not have a driver's license. Meanwhile, without first examining the documents, and unaware that respondent had no driver's license, Officer McNamee opened the door of the car to look for the VIN on the doorjamb and, not finding it there, reached inside to remove papers obstructing his view of the VIN on the dashboard. While doing so, McNamee saw a gun handle protruding from underneath the driver's seat. Respondent was arrested, and eventually convicted, for criminal possession of a weapon. He was issued summonses for his traffic violations.

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*I do not suggest, of course, that the Fourth Amendment is inapplicable in this context. An officer may not use VIN inspection as a pretext for searching a vehicle for contraband or weapons. Nor may the officer undertake an entry more extensive than reasonably necessary to remove any obstruction and read the VIN.

McNamee conducted the search even though "[i]t is undisputed that the police officers had no reason to suspect that respondent's car was stolen, that it contained contraband, or that respondent had committed an offense other than the traffic violations." *Ante,* at 108.

II

The Fourth Amendment guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." "This fundamental right is preserved by a requirement that searches be conducted pursuant to a warrant issued by an independent judicial officer." *California* v. *Carney,* 471 U. S. 386, 390 (1985). While we have found no Fourth Amendment violation in certain warrantless police searches of cars, see, *e. g.*, *Carroll* v. *United States,* 267 U. S. 132 (1925), this narrow exception "applies only to searches of vehicles that are supported by probable cause." *United States* v. *Ross,* 456 U. S. 798, 809 (1982).

Officer McNamee's *search* of respondent's car was clearly without probable cause and was therefore patently unconstitutional. The Court's contrary holding rests not on any reasoning or logic grounded in Fourth Amendment jurisprudence, but rather on a strained and irrelevant analysis. To substitute for the absence of probable cause, the Court struggles to balance "the governmental interest in highway safety served by obtaining the VIN" and a "concern for the officers' safety" against the "nature and quality" of the intrusion that took place. *Ante,* at 118. Once again, the Court "takes a long step . . . toward 'balancing' into oblivion the protections the Fourth Amendment affords." *Michigan* v. *Long, supra,* at 1065 (BRENNAN, J., dissenting). The police had no justification whatever, let alone probable cause, to *search* for the

VIN, and therefore no amount of "balancing" can make the *search* of respondent's car constitutional.

A

The Court says much about the "important role played by the VIN in the pervasive governmental regulation of the automobile," and holds that respondent had no "reasonable expectation of privacy in the VIN." *Ante*, at 114. This aspect of the Court's analysis is particularly baffling. Of course, the VIN plays a significant part in federal and state schemes for regulating automobiles, and federal regulations require vehicle manufacturers to install VINs that may be read from outside the passenger compartment. See 49 CFR § 571.115 (S4.6) (1984). However, even assuming that respondent had no reasonable expectation of privacy in the VIN, why is this relevant to the question we decide? Officer McNamee did not look for the VIN from outside of respondent's vehicle, but *searched* the car without respondent's consent in order to locate the VIN. By focusing on the object of the search—the VIN—the Court misses the issue we must decide: whether an interior *search* of the car to discover that object was constitutional. Regardless of whether he had a reasonable expectation of privacy in the VIN, respondent clearly retained a reasonable expectation of privacy with respect to the area searched by the police—the car's interior. As the court below noted, "[t]he fact that certain information must be kept, or that it may be of a public nature, does not automatically sanction police intrusion into private space in order to obtain it." 63 N. Y. 2d 491, 495, 472 N. E. 2d 1009, 1011 (1984); cf. *id.*, at 496–497, 472 N. E. 2d, at 1012–1013 (noting that state law only requires drivers to furnish police with vehicle identification).

B

Because vehicles are mobile and subject to pervasive government regulation, an individual's justifiable expectation of privacy in a vehicle is less than in his home. *California* v.

Carney, supra. This is why the Court has held that warrantless searches of cars may sometimes not violate the Fourth Amendment, but only if the searches are supported by probable cause. See, *e. g., Carroll* v. *United States, supra; United States* v. *Ross, supra.* For "[a]n individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation." *Delaware* v. *Prouse,* 440 U. S. 648, 662 (1979); see also *Almeida-Sanchez* v. *United States,* 413 U. S. 266, 269 (1973) ("[T]he *Carroll* doctrine does not declare a field day for the police in searching automobiles"). Because the Fourth Amendment constrains the State's authority to *search* automobiles under the guise of "regulation," the fact that the Government uses the VIN as part of its scheme for regulating automobiles is insufficient to justify a *search* of the passenger compartment to retrieve such information. Rather, as is ordinarily the case with any car search, a VIN search must be supported by probable cause. See *Almeida-Sanchez* v. *United States, supra,* at 269 ("Automobile or no automobile, there must be probable cause for the search"). "[T]o eliminate any requirement that an officer be able to explain the reasons for his actions . . . leaves police discretion utterly without limits." *Pennsylvania* v. *Mimms,* 434 U. S. 106, 122 (1977) (STEVENS, J., dissenting). In this case, the police clearly lacked probable cause to search for the VIN.

The Court suggests that respondent's traffic infractions provided the requisite probable cause, this on the ground that there was "probable cause focusing suspicion on the individual affected by the search." *Ante,* at 118. This analysis makes a mockery of the Fourth Amendment. There can be no question that respondent's traffic offenses gave the police probable cause to stop the car and to demand some form of vehicle identification. *Delaware* v. *Prouse, supra,* at 663. Too, this sort of routine traffic stop generally gives police an *opportunity* to inspect the VIN through the car windshield.

But Fourth Amendment protections evaporate if this supplies the requisite probable cause to *search* for a VIN not visible from the exterior of the car. Plainly the search of the interior for the VIN was unnecessary since respondent had supplied his car registration certificate, and there is no suggestion that it was inadequate.[1]

C

The Court supplies not an iota of reasoning to support the holding that respondent's traffic infractions gave the police probable cause to search for the VIN. The Court is content simply to conclude that "the governmental interest in highway safety served by obtaining the VIN is of the first order." *Ante*, at 118. Although I agree that the government has a strong interest in promoting highway safety, see *Delaware* v. *Prouse*, *supra*, at 658, I fail to see just how the VIN search conducted here advanced that interest. Despite the Court's lengthy exposition on the variety of safety-related purposes served by the VIN,[2] respondent's car was not searched to further any of the identified interests. If the officers intended to identify what they considered to be an "unsafe" vehicle, that could have been done without searching respondent's car. Thus, the mere fact that the State utilizes the VIN in conjunction with regulations designed to promote highway safety does not give the police a reason to *search* for such information every time a motorist violates a traffic law.[3] Absent some reason to search for the VIN, the government's admittedly strong interest in promoting highway safety cannot validate the intrusion resulting from the *search* of respondent's vehicle.

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[1] Indeed, the facts of this case belie any suggestion that the VIN search was needed positively to identify respondent's vehicle. Officer McNamee did not wait to see respondent's vehicle registration certificate before he started to search respondent's car, and did not record the VIN he found in order to compare it with other identifying documents.

[2] The Court notes that "[t]he ease with which the VIN allows identification of a particular vehicle assists the various levels of government in many ways." *Ante*, at 111. As examples, the Court explains that "the VIN improves the efficacy of recall campaigns," "assists researchers in determining the risks of driving various makes and models of automobiles," helps to "reduc[e] the number of those injured in accidents who go uncompensated for lack of insurance," ensures "that automobile operators are driving safe vehicles," and "[b]y making automobile theft more difficult . . . safeguards not only property but also life and limb." *Ibid.*

III

The Court, relying on *Pennsylvania* v. *Mimms*, *supra*, and *Michigan* v. *Summers*, 452 U. S. 692 (1981), next attempts to support its holding on the ground that "[i]n light of the danger to the officers' safety [that would be] presented by returning respondent immediately to his car [to uncover the VIN,] the search to obtain the VIN was not prohibited by the Fourth Amendment." *Ante*, at 116. Neither cited decision supports this argument.

In *Summers*, police detained the occupant of a home being searched pursuant to a valid warrant. The Court held that this seizure was constitutional because it served several important law enforcement interests, including officer safety, and because the search warrant provided a reasonable basis for the police to determine that the occupant was engaged in criminal activity and should therefore be detained. 452 U. S., at 702–704. By contrast, here there was no reason for the officers to search the car to inspect the VIN. The officers knew only that respondent had committed minor traffic violations, and while this may have given them an *opportunity* to inspect the VIN, it did not provide a reason to *search* the interior of the car for it.

In *Mimms*, police stopped an automobile for a traffic infraction, and ordered the driver to step outside the vehicle. As the driver emerged, the officers noticed a large bulge under his jacket, and after frisking him, discovered a loaded revolver. The Court held that because such actions protected officer safety, the police could legitimately order a driver out of his car when they made a lawful traffic stop. Unlike the situation in *Mimms*, the intrusion in this case—the search of respondent's vehicle—did not directly serve officer safety. Nevertheless, the Court finds that "[t]o have returned respondent immediately to the automobile [to clear the papers on the dashboard obscuring the VIN] would have placed the officers in the same situation that the holding in *Mimms* allows officers to avoid." *Ante*, at 116. Again, the Court forgets that the police, with *no reason* to search the interior, had *no reason* to return respondent to his car. Thus, the State's interest in protecting officer safety cannot validate the search.

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[3] By analogy, had respondent emerged from his car without his vehicle registration certificate or driver's license, I do not read the Court's opinion to hold that the police could have searched the passenger compartment in order to locate these documents, even though they also play important roles in the State's regulation of automobiles.

Of course, if the officers had reasonable grounds to suspect that the traffic stop presented a threat to their safety, they would have been authorized to search respondent's vehicle for weapons. See *Michigan* v. *Long*, 463 U. S., at 1051. However, neither officer ever suggested that the situation posed any danger, and the court below specifically found that the facts "reveal no reason for the officer[s] . . . to act to protect [their] own safety." 63 N. Y. 2d, at 496, 472 N. E. 2d, at 1012. In the absence of even the slightest suspicion of danger, the search of respondent's car cannot be justified on grounds of officer safety.

IV

Finally, the Court finds that "[t]he 'critical' issue of the intrusiveness of the Government's action . . . also here weighs in favor of allowing the search." *Ante*, at 118. The Court's effort to minimize the extent of the intrusion, see *ante*, at 118–119, won't wash. Officer McNamee clearly *searched* respondent's car by opening the door and reaching into the passenger compartment to remove papers from the dashboard. Even if he did not engage in a full-scale excavation, this *search* exposed areas of the passenger compartment not visible from outside the vehicle. "The narrow intrusions involved in [*Terry* v. *Ohio*, 392 U. S. 1 (1968), and its progeny] were judged by a balancing test rather than by the general principle that Fourth Amendment seizures must be supported by the 'long-prevailing standards' of probable cause . . . only because these intrusions fell far short of the kind of intrusion associated with an arrest." *Dunaway* v. *New York*, 442 U. S. 200, 212 (1979). That the search conducted here was substantially more intrusive than an ordinary traffic stop starkly exposes the impropriety of the Court's strained effort to sanction McNamee's patently illegal search by the balancing approach. In *United States* v. *Place*, 462 U. S. 696, 721 (1983), JUSTICE BLACKMUN too noted his concern over the "emerging tendency on the part of the Court to convert the *Terry* decision into a general statement that the Fourth Amendment requires only that any seizure be reasonable." Cf. 462 U. S., at 718 (BRENNAN, J., concurring in result); *Kolender* v. *Lawson*, 461 U. S. 352, 363 (1983) (BRENNAN, J., concurring); *Florida* v. *Royer*, 460 U. S. 491, 509 (1983) (BRENNAN, J., concurring in result).[4]

In any event, even if there had been only a limited search here that justified the Court in balancing the extent of the intrusion against the importance of the governmental interests allegedly served, this alone cannot legalize the *search* of respondent's car. In situations where the Court has approved of very limited intrusions on less than probable cause, the Court has always required that "the police officer . . . be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry* v. *Ohio*, 392 U. S. 1, 21 (1968); see *Michigan* v. *Long*, *supra*, at 1049 (police must have reasonable belief that suspect is dangerous and may gain immediate control of weapons to search areas of passenger compartment where weapons may be placed or hidden); *Delaware* v. *Prouse*, 440 U. S., at 663 (police must have reasonable suspicion that motorist is unlicensed, that car is unregistered, or that either the vehicle or an occupant is otherwise subject to seizure, to stop automobile and detain driver); *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 881–882 (1975) (police must have reasonable suspicion that vehicle contains illegal aliens in order to stop the car and question occupants about citizenship). In this case, respondent's traffic infractions did not give the police a reason to search for the VIN, and the police offered no other justification that would reasonably warrant such an intrusion.

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[4] "There are important reasons why balancing inquiries should not be conducted except in the most limited circumstances." *United States* v. *Place*, 462 U. S., at 718 (BRENNAN, J., concurring in result). "[T]he protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases." *Dunaway* v. *New York*, 442 U. S. 200, 213 (1979). As a general rule, "the Framers of the [Fourth] Amendment balanced the interests involved and decided that a seizure is reasonable only if supported by a judicial warrant based on probable cause." *United States* v. *Place*, *supra*, at 722 (BLACKMUN, J., concurring in judgment).

In sum, the Court's decision today is still another of its steps on the road to evisceration of the protections of the Fourth Amendment. The Court's willingness to sanction a car search that the police had no probable cause to conduct highlights this trend. However, I find the Court's holding particularly disturbing because none of the factors the Court relies upon—the lack of reasonable expectation of privacy in the VIN, the officers' observing respondent commit minor traffic violations, the government's interest both in promoting highway safety and in shielding officers from danger, and the allegedly limited nature of the search that took place—gave the police *any reason* to search for the VIN. The Court once again disregards the admonition of Justice Jackson:

> "[Fourth Amendment rights] are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the

> individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government." *Brinegar* v. *United States*, 338 U. S. 160, 180 (1949) (dissenting opinion).[5]

JUSTICE WHITE, with whom JUSTICE STEVENS joins, dissenting.

The police officer involved in this case entered the interior of respondent's automobile, an area protected by the Fourth Amendment against unreasonable searches and seizures. A car may be searched without a warrant if there is probable cause to do so, but no one suggests that this precondition for a search existed here. The entry was solely to remove an obstruction that prevented the VIN from being seen from outside the car. The issue is whether the governmental interest in obtaining the VIN by entering a protected area is sufficient to outweigh the owner's privacy interest in the interior of the car. I am unprepared, at least for the reasons the Court gives, to conclude that it is.

Had Class remained in his car and refused an officer's order (1) to turn over his registration certificate and (2) to remove the article obscuring the VIN, there would have been no more justification for entering the interior of the car and doing what was necessary to read the VIN than there would have been to enter and search for the registration certificate in the glove compartment. It may be that under our cases, Class could have been sanctioned for his refusal in such a case, but we have never held that his refusal would permit a search of the glove compartment. Even if it did, it would be different if there was no refusal at all, but just an entry to find a registration certificate. If that is the case, this one is no different in kind: there was no refusal and nothing but a nonconsensual entry to search without probable cause and without emergent circumstances.

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[5] JUSTICE POWELL, in a concurring opinion joined by THE CHIEF JUSTICE, would find that "[w]here the VIN is not visible from outside the vehicle or voluntarily disclosed by the driver, the officer may enter the vehicle to the extent necessary to read the VIN." *Ante*, at 120. Even were I to agree with this standard, in this case Officer McNamee searched respondent's car without ever asking him voluntarily to disclose the VIN's location.

It makes no difference that the law requires the VIN to be visible from outside the car. Otherwise, a requirement that the VIN be carried in a prominent location in the trunk of the car would justify searches of that area whenever there was a stop for a traffic violation. I thus do not join the Court's opinion, which in effect holds that a search of a car for the VIN is permissible whenever there is a legal stop, whether or not the driver is even asked to consent.

Nevertheless, Class was unlicensed and the police were not constitutionally required merely to give him a citation and let his unlicensed driving continue. Arguably, one of the officers legally could have driven the car away himself and in the process noticed the gun; the car could have been towed and inspected at the station; or Class could have been arrested for driving without a license and the entire car searched. But the Court eschews these possible alternative rationales and rests its judgment on grounds that I do not accept.

UNITED STATES *v.* KOECHER

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 84-1922. Argued January 15, 1986—Decided February 25, 1986

755 F. 2d 1022, vacated and remanded.

Christopher J. Wright argued the cause for the United States. With him on the briefs were *Solicitor General Fried, Assistant Attorney General Trott, Deputy Solicitor General Frey*, and *Andrew J. Pincus.*

Gerard E. Lynch argued the cause for respondent. With him on the brief were *George Kannar* and *Charles S. Sims.*

PER CURIAM.

The judgment of the United States Court of Appeals for the Second Circuit is vacated, and the case is remanded to the United States District Court for the Southern District of New York with instructions to dismiss the cause as moot.

TEXAS *v.* McCULLOUGH

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 84-1198. Argued December 10, 1985—Decided February 26, 1986

Respondent was tried before a jury in a Texas District Court and convicted of murder. He elected to be sentenced by the jury, as was his right under Texas law, and the jury imposed a 20-year sentence. The trial judge then granted respondent's motion for a new trial on the basis of prosecutorial misconduct. Respondent was retried before a jury, with the same trial judge presiding, and again was found guilty. This time he elected to have the judge fix his sentence, and she imposed a 50-year sentence. To justify the longer sentence, the judge entered the following findings of fact: the testimony of two state witnesses who had not testified at the first trial added to the credibility of the State's key witness and detracted from the credibility of respondent and a defense witness; the two new witnesses' testimony directly implicated respondent in the commission of the murder and shed new light upon his life and conduct; and it was learned for the first time on retrial that respondent had been released from prison only four months before the murder. The Texas Court of Appeals reversed and sentenced respondent to 20 years' imprisonment, considering itself bound by *North Carolina* v. *Pearce*, 395 U. S. 711, wherein it was held that the Due Process Clause of the Fourteenth Amendment prevented increased sentences on retrial when the increase was motivated by the sentencing judge's vindictiveness, and that to show the absence of vindictiveness the reasons for imposing the increased sentence must affirmatively appear. The Texas Court of Criminal Appeals, while holding that, as a matter of procedure, the case should have been remanded to the trial judge for resentencing, also held that under *Pearce* vindictiveness must be presumed even though a jury had fixed punishment at the first trial and a judge had fixed it at the second trial.

Held: The Due Process Clause was not violated by the trial judge's imposition of a greater sentence on retrial. Pp. 137-144.

(a) The facts of this case provide no basis for a *Pearce* presumption of vindictiveness. In contrast to *Pearce*, respondent's second trial came about because the trial judge herself concluded that the prosecutor's misconduct required it. Granting respondent's motion for a new trial hardly suggests any vindictiveness on the judge's part toward him. The presumption is also inapplicable because different sentencers assessed the varying sentences, the second sentencer providing an on-the-record, logical, nonvindictive reason for the longer sentence. Pp. 137–140.

(b) Even if the *Pearce* presumption were to apply here, the trial judge's findings on imposing the longer sentence overcame that presumption. Those findings clearly constituted "objective information justifying the increased sentence," *United States* v. *Goodwin*, 457 U. S. 368, 375. Pp. 141–144.

720 S. W. 2d 89, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, *post*, p. 144. MARSHALL, J., filed a dissenting opinion, in which BLACKMUN and STEVENS, JJ., joined, *post*, p. 145.

Randall L. Sherrod argued the cause for petitioner. With him on the brief was *Deane C. Watson*.

Jeff Blackburn argued the cause *pro hac vice* for respondent. With him on the brief were *Michael B. Charlton* and *John Mann*.*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the Due Process Clause of the Fourteenth Amendment was violated when the defendant in a state court received a greater sentence on retrial where the earlier sentence was imposed by the jury, the trial judge granted the defendant's motion for a new trial, the defendant requested that in the second trial the judge fix the sentence, and the judge entered findings of fact justifying the longer sentence.

I

In 1980, Sanford James McCullough was tried before a jury in the Randall County, Texas, District Court and convicted of murder. McCullough elected to be sentenced by the jury, as

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**Acting Solicitor General Fried, Assistant Attorney General Trott, Deputy Solicitor General Frey, Alan I. Horowitz,* and *Patty Merkamp Stemler* filed a brief for the United States as *amicus curiae* urging reversal.

was his right under Texas law. Tex. Code Crim. Proc. Ann., Art. 37.07 (Vernon 1981). The jury imposed a 20-year sentence. Judge Naomi Harney, the trial judge, then granted McCullough's motion for a new trial on the basis of prosecutorial misconduct.

Three months later, McCullough was retried before a jury, with Judge Harney again presiding. At this trial, the State presented testimony from two witnesses who had not testified at the first trial that McCullough rather than his accomplices had slashed the throat of the victim. McCullough was again found guilty by a jury. This time, he elected to have his sentence fixed by the trial judge. Judge Harney sentenced McCullough to 50 years in prison and, upon his motion, made findings of fact as to why the sentence was longer than that fixed by the jury in the first trial. She found that in fixing the sentence she relied on new evidence about the murder that was not presented at the first trial and hence never made known to the sentencing jury. The findings focused specifically on the testimony of two new witnesses, Carolyn Hollison McCullough and Willie Lee Brown, which "had a direct effect upon the strength of the State's case at both the guilt and punishment phases of the trial." App. to Pet. for Cert. A-23. In addition, Judge Harney explained that she learned for the first time on retrial McCullough had been released from prison only four months before the later crime had been committed. *Ibid.* Finally, the judge candidly stated that, had she fixed the first sentence, she would have imposed more than 20 years. *Id.*, at A-24.[1]

On appeal, the Texas Court of Appeals reversed and resentenced McCullough to 20 years' imprisonment. 680 S. W. 2d 493 (1983). That court considered itself bound by this Court's decision in *North Carolina* v. *Pearce*, 395 U. S. 711 (1969), and held that a longer sentence upon retrial could be imposed only if it was based upon conduct of the defendant occurring after the original trial.[2] Petitioner sought review in the Texas Court of Criminal Appeals, and that court limited its review to whether the Texas Court of Appeals had authority to limit respondent's sentence to 20 years. 720 S. W. 2d 89 (1983). The court concluded that, as a matter of procedure, the case should have been remanded to the trial judge for resentencing. On petitioner's motion for rehearing, the court concluded that under *Pearce* vindictiveness must be presumed even though a jury had fixed punishment at the first trial and a judge had fixed it at the second trial. We granted certiorari. 472 U. S. 1007 (1985). We reverse.

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[1] Later Judge Harney sentenced two other defendants for their role in the same murder. She gave both defendants 50-year sentences identical to McCullough's.

II

In *North Carolina* v. *Pearce, supra,* the Court placed a limitation on the power of a sentencing authority to increase a sentence after reconviction following a new trial. It held that the Due Process Clause of the Fourteenth Amendment prevented increased sentences when that increase was motivated by vindictiveness on the part of the sentencing judge. The Court stated:

> "Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a de-

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[2] The Texas Court of Appeals in applying *Pearce* observed:

"This case demonstrates the excessive scope of *Pearce.* The trial judge filed detailed and valid reasons for the heavier punishment and there is nothing in the record to indicate that the increased punishment resulted from vindictiveness. However, the reasons affirmatively supported by evidence are based on events occurring during or after the crime but before the first trial. Although those matters were not brought out at the first trial, they cannot be used [under *Pearce*] to increase punishment because none occurred *after* the first trial." 680 S. W. 2d, at 496, n. 2.

> fendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.
>
> "In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, *the reasons for his doing so must affirmatively appear.*" *Id.*, at 725–726 (emphasis added).

Beyond doubt, vindictiveness of a sentencing judge is the evil the Court sought to prevent rather than simply enlarged sentences after a new trial. The *Pearce* requirements thus do not apply in every case where a convicted defendant receives a higher sentence on retrial. Like other "judicially created means of effectuating the rights secured by the [Constitution]," *Stone* v. *Powell*, 428 U. S. 465, 482 (1976), we have restricted application of *Pearce* to areas where its "objectives are thought most efficaciously served," 428 U. S., at 487. Accordingly, in each case, we look to the need, under the circumstances, to "guard against vindictiveness in the resentencing process." *Chaffin* v. *Stynchcombe*, 412 U. S. 17, 25 (1973) (emphasis omitted). For example, in *Moon* v. *Maryland*, 398 U. S. 319 (1970), we held that *Pearce* did not apply when the defendant conceded and it was clear that vindictiveness had played no part in the enlarged sentence. In *Colten* v. *Kentucky*, 407 U. S. 104 (1972), we saw no need for applying the presumption when the second court in a two-tier trial system imposed a longer sentence. In *Chaffin*, *supra*, we held *Pearce* not applicable where a *jury* imposed the increased sentence on retrial. Where the prophylactic rule of *Pearce* does not apply, the defendant may still obtain relief if he can show actual vindictiveness upon resentencing. *Wasman* v. *United States*, 468 U. S. 559, 569 (1984).

The facts of this case provide no basis for a presumption of vindictiveness. In contrast to *Pearce*, McCullough's second trial came about because the trial judge herself concluded that the prosecutor's misconduct required it. Granting

McCullough's motion for a new trial hardly suggests any vindictiveness on the part of the judge towards him. "[U]nlike the judge who has been reversed," the trial judge here had "no motivation to engage in self-vindication." *Chaffin*, 412 U. S., at 27. In such circumstances, there is also no justifiable concern about "institutional interests that might occasion higher sentences by a judge desirous of discouraging what he regards as meritless appeals." *Ibid.* In granting McCullough's new trial motion, Judge Harney went on record as agreeing that his "claims" had merit. Presuming vindictiveness on this basis alone would be tantamount to presuming that a judge will be vindictive towards a defendant merely because he seeks an acquittal. Thus, in support of its position, the dissent conjures up visions of judges who view defendants as temerarious for filing motions for new trials, *post*, at 151, and who are "annoyed" at being forced "to sit through . . . trial[s] whose result[s] [are] foregone conclusion[s]," *post*, at 150. We decline to adopt the view that the judicial temperament of our Nation's trial judges will suddenly change upon the filing of a successful post-trial motion. The presumption of *Pearce* does not apply in situations where the possibility of vindictiveness is this speculative, particularly since the presumption may often "operate in the absence of any proof of an improper motive and thus . . . block a legitimate response to criminal conduct," *United States* v. *Goodwin*, 457 U. S. 368, 373 (1982). Indeed, not even "apprehension of such a retaliatory motivation on the part of the sentencing judge," *Pearce*, 395 U. S., at 725, could be present in this case. McCullough was entitled by law to choose to be sentenced by either a judge or a jury. Faced with that choice, on retrial McCullough chose to be sentenced by Judge Harney. There can hardly be more emphatic affirmation of his appraisal of Judge Harney's fairness than this choice. Because there was no realistic motive for vindictive sentencing, the *Pearce* presumption was inappropriate.

The presumption is also inapplicable because different sentencers assessed the varying sentences that McCullough received. In such circumstances, a sentence "increase" cannot truly be said to have taken place. In *Colten* v. *Kentucky*, *supra*, which bears directly on this case, we recognized that when different sentencers are involved,

> "[i]t may often be that the [second sentencer] will impose a punishment more severe than that received from the [first]. But it no more follows that such a sentence is a vindictive penalty for seeking a [new] trial than that the [first sentencer] imposed a lenient penalty." *Id.*, at 117.

Here, the second sentencer provides an on-the-record, wholly logical, nonvindictive reason for the sentence. We read *Pearce* to require no more, particularly since trial judges must be accorded broad discretion in sentencing, see *Wasman*, *supra*, at 563–564.

In this case, the trial judge stated candidly her belief that the 20-year sentence respondent received initially was unduly lenient in light of significant evidence not before the sentencing jury in the first trial. On this record, that appraisal cannot be faulted. In any event, nothing in the Constitution prohibits a state from permitting such discretion to play a role in sentencing.[3]

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[3] *Pearce* itself apparently involved different judges presiding over the two trials, a fact that has led some courts to conclude by implication that the presumption of vindictiveness applies even where different sentencing judges are involved. See, *e. g.*, *United States* v. *Hawthorne*, 532 F. 2d 318, 323 (CA3), cert. denied, 429 U. S. 894 (1976). That fact, however, may not have been drawn to the Court's attention and does not appear anywhere in the Court's opinion in *Pearce*. Clearly the Court did not focus on it as a consideration for its holding. See *Hardwick* v. *Doolittle*, 558 F. 2d 292, 299 (CA5 1977), cert. denied, 434 U. S. 1049 (1978). Subsequent opinions have also elucidated the basis for the *Pearce* presumption. We held in *Chaffin* v. *Stynchcombe*, 412 U. S. 17 (1973), for instance, that the presumption derives from the judge's "personal stake in the prior conviction," *id.*, at 27, a statement clearly at odds with reading *Pearce* to answer

III

Even if the *Pearce* presumption were to apply here, we hold that the findings of the trial judge overcome that presumption. Nothing in *Pearce* is to be read as precluding a rebuttal of intimations of vindictiveness. As we have explained, *Pearce* permits "a sentencing authority [to] justify an increased sentence by affirmatively identifying relevant conduct or events that occurred subsequent to the original sentencing proceedings." *Wasman*, 468 U. S., at 572; see also *id.*, at 573 (POWELL, J., concurring in part and concurring in judgment). This language, however, was never intended to describe exhaustively all of the possible circumstances in which a sentence increase could be justified. Restricting justifications for a sentence increase to *only* "events that occurred subsequent to the original sentencing proceedings" could in some circumstances lead to absurd results. The Solicitor General provides the following hypothetical example:

> "Suppose . . . that a defendant is convicted of burglary, a non-violent, and apparently first, offense. He is sentenced to a short prison term or perhaps placed on probation. Following a successful appeal and a conviction on retrial, it is learned that the defendant has been using an alias and in fact has a long criminal record that includes other burglaries, several armed robbery convictions, and a conviction for murder committed in the course of a burglary. None of the reasons underlying *Pearce* in any way justifies the perverse result that the defendant receive no greater sentence in light of this information than he originally received when he was thought to be a first offender." Brief for United States as *Amicus Curiae* 26.

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the two-sentencer issue. We therefore decline to read *Pearce* as governing this issue. See also n. 4, *infra*.

We agree with the Solicitor General and find nothing in *Pearce* that would require such a bizarre conclusion.[4] Perhaps then the reach of *Pearce* is best captured in our statement in *United States* v. *Goodwin*, 457 U. S., at 374:

> "In sum, the Court [in *Pearce*] applied a presumption of vindictiveness, which may be overcome only by objective information . . . justifying the increased sentence."

Nothing in the Constitution requires a judge to ignore "objective information . . . justifying the increased sentence." In refusing to apply *Pearce* retroactively we observed that "the *Pearce* prophylactic rules assist in guaranteeing the propriety of the sentencing phase of the criminal process." *Michigan* v. *Payne*, 412 U. S. 47, 52–53 (1973). Realistically, if anything this focus would *require* rather than *forbid* the consideration of the relevant evidence bearing on sentence since

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[4] The dissent contends that this objection "was considered in *Pearce* and rejected there." *Post*, at 155. In fact, the issue, like the two-sentencer issue just discussed, was not before the Court because in neither *Pearce* nor its companion case did the State offer "any reason or justification" for the increased sentence. 395 U. S., at 726. Moreover, *Pearce* was argued on the assumption that the Constitution either absolutely forbade or permitted increased sentences on retrial. None of the briefs advanced the intermediate position ultimately relied upon by the Court that the Constitution permits increased sentences only in certain circumstances. Cf. Brief for American Civil Liberties Union et al. as *Amici Curiae* in *North Carolina* v. *Pearce*, O. T. 1968, No. 413, pp. 8–10 (quoted *post*, at 155–156) (arguing that "[t]o subject an accused to the risk of harsher punishment . . . as a condition of appeal . . . is an unconstitutional condition which violates the Due Process Clauses of the Fifth and Fourteenth Amendments"). Thus, as the Solicitor General points out, "in formulating the standard set forth in *Pearce*, the Court was completely without the 'sharpen[ing of] the presentation of issues' provided by the adversary process, 'upon which the court so largely depends for illumination of difficult constitutional issues.'" Brief for United States as *Amicus Curiae* 22–23 (quoting *Baker* v. *Carr*, 369 U. S. 186, 204 (1962)). But even if *Pearce* could be read to speak definitively to this situation, we are not reluctant to tailor judicially created rules to implement constitutional guarantees, like the *Pearce* rule, see *Michigan* v. *Payne*, 412 U. S. 47, 51 (1973), when the need to do so becomes apparent. Cf. *United States* v. *Leon*, 468 U. S. 897 (1984).

"'[h]ighly relevant—if not essential—to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.'" *Wasman, supra,* at 564 (quoting *Williams* v. *New York,* 337 U. S. 241, 247 (1949)).

To be sure, a defendant may be more reluctant to appeal if there is a risk that new, probative evidence supporting a longer sentence may be revealed on retrial. But this Court has never recognized this "chilling effect" as sufficient reason to create a constitutional prohibition against considering relevant information in assessing sentences. We explained in *Chaffin* v. *Stynchcombe,* 412 U. S., at 29, that "the Court [in *Pearce*] intimated no doubt about the constitutional validity of higher sentences in the absence of vindictiveness despite whatever incidental deterrent effect they might have on the right to appeal." We see no reason to depart from this conclusion.

It is clear that the careful explanation by the trial judge for the sentence imposed here fits well within our prior holdings. Judge Harney relied on the testimony of two new witnesses which she concluded "had a direct effect upon the strength of the State's case at both the guilt and punishment phases of the trial." App. to Pet. for Cert. A–23. The judge supported this conclusion with specific findings, noting that "[t]he testimony [of the two new witnesses] added to the credibility of the State's key witness . . . and detracted from the credibility of Dennis McCullough and [respondent] who both testified for the defense." *Ibid.* The judge also found that "[t]he testimony of these two witnesses directly implicated the defendant in the commission of the murder in question and showed what part he played in committing the offense." *Id.,* at A–22. Finally, the judge concluded that their testimony "shed new light upon [McCullough's] life, conduct, and his mental and moral propensities." *Id.,* at A–23. These findings clearly constitute "objective information . . . justifying the increased sentence."

Judge Harney also found that McCullough had been released from confinement only four months before the murder, *ibid.*, another obviously relevant fact not before the sentencing jury in the first trial. We have recognized the state's legitimate interest "in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law." *Rummel* v. *Estelle*, 445 U. S. 263, 276 (1980). A defendant who commits new crimes within four months of his release from prison clearly poses a greater danger to society than one who commits crimes less often. To foreclose reliance on the kind of pertinent new information developed in the second trial would be wholly incompatible with modern sentencing standards. This new objective information also amply justified McCullough's increased sentence.

In setting aside the second sentence, the Texas Court of Appeals recognized that the new information bore legitimately on the appropriate sentence to impose, but concluded, reluctantly, that *Pearce* precluded reliance on this information. It is appropriate that we clarify the scope and thrust of *Pearce*, and we do so here.

The case is remanded to the Texas Court of Criminal Appeals for further proceedings not inconsistent with this opinion.

Reversed and remanded.

JUSTICE BRENNAN, concurring in the judgment.

After respondent was sentenced to 20 years' imprisonment upon his conviction for murder, Judge Harney granted respondent's motion for a new trial based on prosecutorial misconduct. Under these circumstances, I believe that the possibility that an increased sentence upon retrial resulted from judicial vindictiveness is sufficiently remote that the presumption established in *North Carolina* v. *Pearce*, 395 U. S. 711 (1969), should not apply here. Because respondent has not shown that the 50-year sentence imposed by

Judge Harney after respondent's retrial resulted from actual vindictiveness for having successfully attacked his first conviction, I would reverse the judgment below.

I emphasize, however, that were I able to find that vindictiveness should be presumed here, I would agree with JUSTICE MARSHALL that "the reasons offered by Judge Harney [were] far from adequate to rebut any presumption of vindictiveness." *Post,* at 152. The Court's dictum to the contrary, see *ante,* at 141–144, serves in my view only to distort the holding of *Pearce.*

JUSTICE MARSHALL, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join, dissenting.

With little more than a passing nod to the considerations that prompted this Court, in *North Carolina* v. *Pearce,* 395 U. S. 711 (1969), to safeguard due process rights by establishing a prophylactic rule of presumptive vindictiveness, the majority first refuses to apply that rule in a case where those considerations are clearly relevant, and then proceeds to rob that rule of any vitality even in cases in which it will be applied. Because I believe that under the rationale of *Pearce* we must presume vindictiveness here and that the findings of the trial judge with respect to respondent's second sentence should not be permitted to defeat that presumption, I must dissent.

I

After the jury in Sanford James McCullough's first trial imposed a sentence of 20 years' imprisonment, the Randall County Criminal District Attorney thought McCullough had been treated much too leniently. A local newspaper quoted the prosecutor as commenting: "A guy's life ought to be worth more than that." Amarillo Globe-Times, Sept. 24, 1980, p. 25, col. 1; Record, Defendant's Exhibit 5. Luckily for the District Attorney, McCullough was not satisfied with the results of his first trial either. McCullough filed a motion with the trial court requesting a new trial and raising two challenges to Judge Harney's conduct of the first trial:

> "I.
>
> "The Trial Court erred in not granting Defendant's Motion for Mistrial subsequent to the prosecutor's improper jury argument concerning the fact that the jury, if they only gave the Defendant ten to fifteen years in the penitentiary, would look outside their window at the end of that period of time and wonder if the criminal out there was the Defendant.
>
> "II.
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> "The Trial Court erred in overruling Defendant's Motion for Mistrial subsequent to the prosecutor's cross-examination of the witness, DENNIS McCULLOUGH, as to a purported 'confession' given by a Co-Defendant, KENNETH McCULLOUGH. Such conduct constituted error in light of *Bruton vs. United States*[, 391 U. S. 123 (1968)]." Defendant's Motion for a New Trial, App. 17.

When Judge Harney entertained this motion on October 6, 1980, there was no argument to be heard. The Assistant District Attorney noted the State's full agreement to a retrial. 2 Tr. 432–433 (Oct. 6, 1980). The next day's newspaper made the prosecutor's motives clear.

> "In a rare occurrence, the Randall County Criminal District Attorney Randy Sherrod said yesterday he has joined a defense motion calling for a new trial in the case of Sanford James McCullough, who was found guilty Sept. 24 of the murder of George Preston Small and sentenced to 20 years in the penitentiary.
>
> "Sherrod said it was the first time in his experience that he had been in agreement with a defense attorney in granting a new trial.
>
> "He said one of the biggest factors influencing his decision to join the defense motion was the possibility of a

> *[sic]* getting a harsher sentence in a new trial." Amarillo Daily News, Oct. 7, 1980, p. C-1, col. 1; Record, Defendant's Exhibit 2.

See also Amarillo Globe-Times, Oct. 7, 1980, p. 21, cols. 1-6 ("DA Agrees to New Trial for Man Convicted in Murder Case"); Record, Defendant's Exhibit 1.

In the face of this publicity, the defense moved for a change of venue, but its motion was denied. 2 Tr. 518 (Nov. 7, 1980). Having failed in this attempt to ensure that McCullough's second jury had no knowledge of his conviction and sentence in the first trial, the defense postponed its election of sentencer until it could hear the results of *voir dire.* 3 Tr. 7-8 (Dec. 10-12, 1980). During *voir dire* at least 13 prospective jurors were excused after indicating that their knowledge of the first trial's results would affect their ability to give McCullough a fair trial. *Id.*, at 17-33. Immediately after the close of *voir dire,* the defendant elected to be sentenced by the trial judge if convicted. *Id.*, at 122; App. 25-26. McCullough's election likely was affected by his counsel's belief that while *Chaffin* v. *Stynchcombe,* 412 U. S. 17 (1973), had made the rule of *North Carolina* v. *Pearce, supra,* inapplicable to resentencing by a different jury, that rule would still bar Judge Harney from imposing a sentence greater than the 20 years defendant had received in his first trial. But fears that *voir dire* had not been sufficient to purge the jury of all knowledge of McCullough's first trial could well have played as great a part in that decision.

After McCullough was convicted a second time, Judge Harney heard argument on sentencing. Defense counsel urged that "there being no additional evidence on the part of the conduct or action of the Defendant subsequent to the prior conviction," the court was bound by *North Carolina* v. *Pearce, supra,* to impose a sentence of not more than 20 years. 2 Tr. 273-274 (Dec. 10-12, 1980). The prosecution replied that because defendant had elected to be sentenced by the trial judge, *North Carolina* v. *Pearce* would not bar the court "from assessing a range of punishment greater than what was received by a jury." 2 Tr. 277 (Dec. 10–12, 1980). Judge Harney sentenced McCullough to 50 years' imprisonment. In response to defendant's motion, she later filed an order in which, while holding the rule of *North Carolina* v. *Pearce* inapplicable, she gave her reasons for imposing a heavier sentence in order to make remand unnecessary should the Court of Criminal Appeals hold the rule applicable. App. 33. She found that the testimony of two new witnesses, Carolyn Sue Hollison McCullough and Willie Lee Brown, implicated defendant in the crime, added to the credibility of certain prosecution witnesses, and detracted from that of certain defense witnesses. The testimony also "shed new light upon the defendant's life, conduct, and his mental and moral propensities," especially his "propensity to commit brutal crimes against persons and to constitute a future threat to society." *Id.*, at 34. Judge Harney noted further that had defendant "elected to have the court set his punishment at the first trial, the court would have assessed more than the twenty (20) year sentence imposed by the jury." *Ibid.* Finally, the court found:

> "Upon retrial after having been found guilty of murder for a second time by a jury and after having made known to the court that he had been involved in numerous criminal offenses and had served time in the penitentiary, the defendant never produced, or even attempted to produce, any evidence that he intended to change his life style, habits, or conduct, or that he had made any effort whatsoever toward rehabilitating himself. Again upon retrial, the [sic] failed to show this court any sign or indication of refraining from criminal conduct in the future, nor did he give any indication upon retrial that he no longer posed a violent and continuing threat to our society." *Id.*, at 35.

II

A

At the outset, one must reject the majority's suggestion, *ante*, at 139, that the fact that McCullough elected to be sentenced by Judge Harney has any relevance to the question whether *Pearce* requires us to presume that the increase in his sentence was the product of the judge's vindictiveness. The message of *Pearce* is not that a defendant should be given a chance to choose the sentencing agency least likely to increase his sentence as a price for his decision to pursue an appeal. Rather, *Pearce* held that under the Due Process Clause, "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." 395 U. S., at 725. Thus, in *Chaffin* v. *Stynchcombe*, *supra*, where the defendant had been tried and sentenced by a jury at his first trial, the Court assumed that if the defendant had elected to be tried and sentenced by a judge at his retrial, *Pearce* would circumscribe the sentence the judge could impose should defendant be convicted again. See 412 U. S., at 33, n. 21.

Had McCullough's first conviction been overturned on appeal, rather than nullified by Judge Harney's order for a retrial, it would make no sense to allow McCullough's decision to be sentenced by the court to deprive him of the safeguards against judicial vindictiveness established in *Pearce*. Whether or not that judge had been the sentencing authority in the first proceeding, we would fear that the judge would have had a "personal stake in the prior conviction" and a "motivation to engage in self-vindication," as well as a wish to "discourag[e] what [s]he regards as meritless appeals." *Chaffin*, *supra*, at 27. Moreover, it would not be appropriate to find a waiver of McCullough's due process right in his exercise of his statutory right to elect his sentencer, especially in a case where defendant's choice might have been influenced by a desire to avoid being sentenced by a jury from a community that had been exposed to the considerable publicity surrounding his first trial.

B

In *Pearce*, recognition of the possibility that personal animosity and institutional prejudices might infect a trial judge's resentencing of a defendant after a successful appeal led this Court to establish a rule of presumptive vindictiveness. The question here is whether these same personal and institutional prejudices may infect a judge's sentencing following a retrial that the judge herself ordered.

The majority reasons that "[i]n contrast to *Pearce*, McCullough's second trial came about because the trial judge herself concluded that the prosecutor's misconduct required it. Granting McCullough's motion for a new trial hardly suggests any vindictiveness on the part of the judge towards him." *Ante*, at 138–139. Such an observation betrays not only an insensitivity to the motives that might underlie any trial judge's decision to grant a motion for a new trial, but also a blindness to the peculiar circumstances surrounding the decision to grant a retrial in this case.

The mere grant of a new trial motion can in no way be considered a guarantee, or even an indication, that the judge will harbor no resentment toward defendant as a result of his decision to exercise his statutory right to make such a motion. Even where a trial judge believes that the assignments of error are valid, she may still resent being given a choice between publicly conceding such errors and waiting for her judgment to be put to the test on appeal. This will be especially true when the errors alleged, however substantial as a matter of constitutional or statutory law, are considered by the judge not to cast doubt on the defendant's guilt. In such a case, the judge might well come to defendant's sentencing annoyed at having been forced to sit through a trial whose result was a foregone conclusion, and quite ready to vent that annoyance by giving the defendant a sentence stiffer than he otherwise would have received. Even if a trial judge is confident that her conduct of a trial was error-free, she may still grant a new trial if she has any doubts as to whether the courts reviewing her ruling will agree. In this situation, the feelings of resentment already alluded to might be augmented by the judge's annoyance with the courts that review her judgments.

Turning to the facts here, I believe the possibility of vindictiveness is even greater in this case than in the general run of cases in which a trial judge has granted a retrial. It is far from clear that Judge Harney's decision to grant a new trial was made out of either solicitude for McCullough or recognition of the merits of his claims. Defendant's motion was uncontested and, if the press coverage is any indication, the judge's decision to grant it was at least as much a boon to the prosecution as it was to defendant. Indeed, the most cynical might even harbor suspicions that the judge shared the District Attorney's hope that a retrial would permit the imposition of a sentence more commensurate with the prosecution's view of the heinousness of the crime for which McCullough had been brought to bar. At any rate, one can imagine that when it fell to Judge Harney to sentence McCullough after his second conviction, his decision to seek a retrial after receiving such a comparatively light sentence from his first jury was counted against him.

Whether any of these considerations actually played any part in Judge Harney's decision to give McCullough a harsher sentence after his retrial is not the issue here, just as it was not the issue in *Pearce*. The point is that the possibility they did play such a part is sufficiently real, and proving actual prejudice, sufficiently difficult, that a presumption of vindictiveness is as appropriate here as it was in *Pearce*. See Van Alstyne, In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant, 74 Yale L. J. 606, 612, and n. 22 (1965) (noting difficulties faced by defendant seeking to show actual vindictiveness).

III

The majority holds that "[e]ven if the *Pearce* presumption were to apply here, . . . the findings of the trial judge overcome that presumption." *Ante*, at 141. I find the reasons offered by Judge Harney far from adequate to rebut any presumption of vindictiveness. Moreover, I believe that by holding those reasons sufficient, the Court effectively eviscerates the effort made in *Pearce* to ensure both that vindictiveness against a defendant for having successfully attacked his first conviction "play no part in the sentence he receives after a new trial," 395 U. S., at 725, and that the "defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." *Ibid.*

A

The presumption of vindictiveness established in *Pearce* was made rebuttable. The Court there held that where a judge decides to impose a more severe sentence on a defendant after a new trial,

> "the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." *Id.*, at 726.

Whether this formulation allowed a sentencing judge to rely on any event occurring after a defendant's first sentencing or only on actual "conduct" by the defendant since that time might have been open to some speculation, at least until *Wasman* v. *United States*, 468 U. S. 559 (1984), resolved that "matter of semantics," *id.*, at 573 (POWELL, J., concurring in part and concurring in judgment). But the Court was quite clear that the conduct or event used to justify an increased sentence must have taken place after the original sentencing proceeding. Indeed, the majority's insistence upon this restriction led to the refusal of JUSTICE WHITE to subscribe to one part of the Court's opinion. He wrote:

> "I join the Court's opinion except that in my view Part II–C should authorize an increased sentence on retrial based on any objective, identifiable factual data not known to the trial judge at the time of the original sentencing proceeding." *Pearce*, 395 U. S., at 751 (concurring in part).

The Court's rejection of the standard proposed by JUSTICE WHITE is no doubt explained by the majority's desire to "protect against reasonable apprehension of vindictiveness that could deter a defendant from appealing a first conviction." *Wasman*, 468 U. S., at 574 (POWELL, J., concurring in part and concurring in judgment). As a majority of the Court recently recognized, the need to eliminate this apprehension was as much a concern of the Court in *Pearce* as actual vindictiveness. See 468 U. S., at 574; *ibid.* (BRENNAN, J., concurring in judgment); *ibid.* (STEVENS, J., concurring in judgment). Recognizing that in the course of any retrial, or merely by virtue of the passage of time, new information relating to events prior to a defendant's original sentencing would become available to a sentencer after retrial, the Court decided that allowing this information to justify a harsher sentence would make the intended guarantee of fairness sound quite hollow to the defendant deciding whether to pursue his statutory right of appeal.

B

By finding the reasons given by Judge Harney adequate to rebut a presumption of vindictiveness, the majority not only disregards the clear rule in *Pearce*. It announces a new regime in which the "chill" that plagued defendants in the days before *Pearce* will once again be felt by those deciding whether to contest their convictions.

I do not doubt Judge Harney's assertions that the testimony of Carolyn Sue Hollison McCullough and Willie Lee Brown strengthened the prosecution's case against McCullough by corroborating evidence and testimony that had already been produced at his first trial and by adding a few brush strokes to the portrayal in the first proceeding of McCullough's role in the crime and of his character. However, "[i]n the natural course of events upon the retrial of a case, one might normally expect the Government to have available additional testimony and evidence of a defendant's guilt if for no other reason than that the Government has had additional time to prepare and refine its presentation." *United States* v. *Tucker*, 581 F. 2d 602, 606, n. 8 (CA7 1978). That such new evidence will be available to a trial judge sentencing a defendant after a retrial is thus inevitable. And if that judge wishes to punish defendant for having asserted his right to a fair trial, she will always be able to point to that new information as the basis for any increase in defendant's sentence the second time around. As one authority has noted: "If a court on retrial could justify an increased sentence on the ground that it now had additional knowledge concerning the defendant's participation in the offense, then the *Pearce* limitation could be evaded in almost every case." 3 W. LaFave & J. Israel, Criminal Procedure 176 (1984). This limitation would be even more easily avoided if a trial judge could rebut a presumption of vindictiveness merely by indicating that she would have given defendant a harsher sentence at his first trial had she been given the chance. That leaves, as the only "new" information to support 30 additional years' imprisonment, the fact that between his two trials, McCullough did not evince a desire to rehabilitate himself. Surely something more is required.

There is neither any reason nor any need for us to believe that dishonest and unconstitutionally vindictive judges actually hold sway in American courtrooms, and even less call for us to doubt the integrity of Judge Harney. The message of

Pearce is that the fear of such vindictiveness is real enough. And a defendant plagued by such an apprehension is likely to take small comfort in any presumption of vindictiveness established for his benefit if the means of rebutting that presumption will always be within the easy reach of the judge who will sentence him should the challenge to his conviction prove unsuccessful. As far as defendants are concerned, today's decision, by permitting references to new, often cumulative, information about the crime charged to satisfy *Pearce*'s demand for "objective information concerning identifiable conduct on the part of the defendant," 395 U. S., at 726, nullifies the guarantee held out in *Pearce*.

Persuaded by the Solicitor General's hypothetical involving a defendant whose prior convictions are not apparant to the trial judge until after defendant's appeal and retrial, the majority concludes that "[r]estricting justifications for a sentence increase to *only* 'events that occurred subsequent to the original sentencing proceedings' could in some circumstances lead to absurd results." *Ante*, at 141. However, this objection to such a restriction was considered in *Pearce* and rejected there, as it should be here. As one *amici curiae* brief advised the *Pearce* Court:

> "In the unlikely event that some prior offense escaped the notice of the court when the accused was under consideration for sentencing, moreover, the government is free to bring a separate proceeding under its habitual offender (recidivism) acts. To the little extent that states may be concerned that sentences generally tend to be imposed in some instances without due consideration of the nature of the offense or the character of the accused, moreover, each state is constitutionally free to make ample provision for staffing and presentence reports to guard against unduly lenient sentencing to whatever extent that government feels to be appropriate. Indeed, each state presumably has done this to the precise extent that it has been genuinely concerned with the secur-

> ing of sentences which are both fair to the accused and adequate for the public safety." Brief for American Civil Liberties Union et al. as *Amici Curiae* in *North Carolina* v. *Pearce*, O. T. 1968, No. 413, pp. 9–10.

IV

A lot has happened since the final day of the October 1968 Term, the day *North Carolina* v. *Pearce* was handed down. But nothing has happened since then that casts any doubt on the need for the guarantee of fairness that this Court held out to defendants in *Pearce*. The majority today begins by denying respondent the promise of that guarantee even though his case clearly calls for its application. The Court then reaches out to render the guarantee of little value to all defendants, even to those whose plight was the explicit concern of the *Pearce* Court in 1969. To renege on the guarantee of *Pearce* is wrong. To do so while pretending not to is a shame. I dissent.

NIX, WARDEN *v.* WHITESIDE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 84-1321. Argued November 5, 1985—Decided February 26, 1986

In preparing for his Iowa state-court trial on a murder charge, respondent consistently told his attorney that although he had not actually seen a gun in the victim's hand when he stabbed the victim, he was convinced that the victim had a gun. Respondent's companions who were present during the stabbing told counsel that they had not seen a gun, and no gun was found. Counsel advised respondent that the existence of a gun was not necessary to establish a claim of self-defense, and that only a reasonable belief that the victim had a gun nearby was necessary even though no gun was actually present. However, during preparation for direct examination shortly before trial, respondent for the first time told counsel that he had seen "something metallic" in the victim's hand. When asked about this, respondent said: "If I don't say I saw a gun, I'm dead." On respondent's insisting that he would testify that he saw "something metallic," counsel told him that if he testified falsely, it would be counsel's duty to advise the court that he felt respondent was committing perjury, and that counsel probably would be allowed to impeach that testimony and would seek to withdraw from representation if respondent insisted on committing perjury. Respondent ultimately testified as originally contemplated, admitting on cross-examination that he had not actually seen a gun in the victim's hand. After the jury found respondent guilty, respondent moved for a new trial, claiming that he had been deprived of a fair trial by counsel's admonitions not to state that he saw a gun or "something metallic." The court denied the motion after a hearing, and the Iowa Supreme Court affirmed the conviction, holding that counsel's actions were not only permissible, but were required under Iowa law. Respondent then sought federal habeas corpus relief, alleging that he had been denied effective assistance of counsel by his attorney's refusal to allow him to testify as he proposed. The District Court denied relief, but the Court of Appeals reversed, concluding that an intent to commit perjury, communicated to counsel, does not alter a defendant's right to effective assistance of counsel, and that counsel's threatened violation of his client's confidences violated the "effective representation" standards set forth in *Strickland* v. *Washington*, 466 U. S. 668.

Held: The Sixth Amendment right of a criminal defendant to assistance of counsel is not violated when an attorney refuses to cooperate with the defendant in presenting perjured testimony at his trial. Pp. 164–176.

(a) *Strickland* v. *Washington, supra*, held that to obtain relief by way of federal habeas corpus on a claim of a deprivation of effective assistance of counsel under the Sixth Amendment, the movant must establish both serious attorney error and prejudice. The Sixth Amendment inquiry is into whether the attorney's conduct was "reasonably effective." A court must be careful not to narrow the wide range of attorney conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into a state's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts. Pp. 164–166.

(b) Counsel's conduct here fell within the wide range of professional responses to threatened client perjury acceptable under the Sixth Amendment. Counsel's duty of loyalty to, and advocacy of, the defendant's cause is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth. Although counsel must take all reasonable lawful means to attain his client's objectives, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law. Moreover, accepted norms require that a lawyer disclose his client's perjury and frauds upon the court. Iowa's Code also expressly permits withdrawal from representation as an appropriate response of an attorney when the client threatens to commit perjury. Pp. 166–171.

(c) The Court of Appeals' holding is not supported by the record since counsel's action, at most, deprived respondent of his contemplated perjury. Whatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying falsely, and the right to counsel includes no right to have a lawyer who will cooperate with planned perjury. There was no breach of professional duty in counsel's admonition to respondent that he would disclose respondent's perjury to the court. Pp. 171–175.

(d) As a matter of law, counsel's conduct here cannot establish the prejudice required for relief under the *Strickland* inquiry. The "conflict of interests" involved was one imposed on the attorney by the client's proposal to commit the crime of fabricating testimony. This is not the kind of conflict of interest that would render the representation constitutionally infirm. Pp. 175–176.

744 F. 2d 1323, reversed.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, *post*, p. 176. BLACKMUN, J., filed an opinion concurring in the judgment, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post*, p. 177. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 190.

Brent R. Appel, Deputy Attorney General of Iowa, argued the cause for petitioner. With him on the briefs were *Thomas J. Miller*, Attorney General, and *Thomas D. McGrane*, Assistant Attorney General.

Patrick Reilly Grady, by appointment of the Court, 471 U. S. 1097, argued the cause and filed a brief for respondent.*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the Sixth Amendment right of a criminal defendant to assistance of counsel is violated when an attorney refuses to cooperate with the defendant in presenting perjured testimony at his trial.[1]

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*Briefs of *amici curiae* urging reversal were filed for the Legal Foundation of America by *Jean Fleming Powers* and *David Crump;* and for the National Association of Criminal Defense Lawyers by *Michael L. Bender* and *Bruce M. Lyons.*

John C. Shepherd, Michael Franck, and *George Kuhlman* filed a brief for the American Bar Association as *amicus curiae.*

[1] Although courts universally condemn an attorney's assisting in presenting perjury, Courts of Appeals have taken varying approaches on how to deal with a client's insistence on presenting perjured testimony. The Seventh Circuit, for example, has held that an attorney's refusal to call the defendant as a witness did not render the conviction constitutionally infirm where the refusal to call the defendant was based on the attorney's belief that the defendant would commit perjury. *United States* v. *Curtis*, 742 F. 2d 1070 (1984). The Third Circuit found a violation of the Sixth Amendment where the attorney could not state any basis for her belief that defendant's proposed alibi testimony was perjured. *United States ex rel. Wilcox* v. *Johnson*, 555 F. 2d 115 (1977). See also *Lowery* v. *Cardwell*, 575 F. 2d 727 (CA9 1978) (withdrawal request in the middle of a bench trial, immediately following defendant's testimony).

I

A

Whiteside was convicted of second-degree murder by a jury verdict which was affirmed by the Iowa courts. The killing took place on February 8, 1977, in Cedar Rapids, Iowa. Whiteside and two others went to one Calvin Love's apartment late that night, seeking marihuana. Love was in bed when Whiteside and his companions arrived; an argument between Whiteside and Love over the marihuana ensued. At one point, Love directed his girlfriend to get his "piece," and at another point got up, then returned to his bed. According to Whiteside's testimony, Love then started to reach under his pillow and moved toward Whiteside. Whiteside stabbed Love in the chest, inflicting a fatal wound.

Whiteside was charged with murder, and when counsel was appointed he objected to the lawyer initially appointed, claiming that he felt uncomfortable with a lawyer who had formerly been a prosecutor. Gary L. Robinson was then appointed and immediately began an investigation. Whiteside gave him a statement that he had stabbed Love as the latter "was pulling a pistol from underneath the pillow on the bed." Upon questioning by Robinson, however, Whiteside indicated that he had not actually seen a gun, but that he was convinced that Love had a gun. No pistol was found on the premises; shortly after the police search following the stabbing, which had revealed no weapon, the victim's family had removed all of the victim's possessions from the apartment. Robinson interviewed Whiteside's companions who were present during the stabbing, and none had seen a gun during the incident. Robinson advised Whiteside that the existence of a gun was not necessary to establish the claim of self-defense, and that only a reasonable belief that the victim had a gun nearby was necessary even though no gun was actually present.

Until shortly before trial, Whiteside consistently stated to Robinson that he had not actually seen a gun, but that he was convinced that Love had a gun in his hand. About a week before trial, during preparation for direct examination, Whiteside for the first time told Robinson and his associate Donna Paulsen that he had seen something "metallic" in Love's hand. When asked about this, Whiteside responded:

> "[I]n Howard Cook's case there was a gun. If I don't say I saw a gun, I'm dead."

Robinson told Whiteside that such testimony would be perjury and repeated that it was not necessary to prove that a gun was available but only that Whiteside reasonably believed that he was in danger. On Whiteside's insisting that he would testify that he saw "something metallic" Robinson told him, according to Robinson's testimony:

> "[W]e could not allow him to [testify falsely] because that would be perjury, and as officers of the court we would be suborning perjury if we allowed him to do it; . . . I advised him that if he did do that it would be my duty to advise the Court of what he was doing and that I felt he was committing perjury; also, that I probably would be allowed to attempt to impeach that particular testimony." App. to Pet. for Cert. A-85.

Robinson also indicated he would seek to withdraw from the representation if Whiteside insisted on committing perjury.[2]

Whiteside testified in his own defense at trial and stated that he "knew" that Love had a gun and that he believed Love was reaching for a gun and he had acted swiftly in self-defense. On cross-examination, he admitted that he had not actually seen a gun in Love's hand. Robinson presented evidence that Love had been seen with a sawed-off shotgun on other occasions, that the police search of the apartment may have been careless, and that the victim's family had removed everything from the apartment shortly after the crime. Robinson presented this evidence to show a basis for Whiteside's asserted fear that Love had a gun.

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[2] Whiteside's version of the events at this pretrial meeting is considerably more cryptic:

"Q. And as you went over the questions, did the two of you come into conflict with regard to whether or not there was a weapon?

"A. I couldn't—I couldn't say a conflict. But I got the impression at one time that maybe if I didn't go along with—with what was happening, that it was no gun being involved, maybe that he will pull out of my trial." App. to Pet. for Cert. A-70.

The jury returned a verdict of second-degree murder, and Whiteside moved for a new trial, claiming that he had been deprived of a fair trial by Robinson's admonitions not to state that he saw a gun or "something metallic." The trial court held a hearing, heard testimony by Whiteside and Robinson, and denied the motion. The trial court made specific findings that the facts were as related by Robinson.

The Supreme Court of Iowa affirmed respondent's conviction. *State* v. *Whiteside*, 272 N. W. 2d 468 (1978). That court held that the right to have counsel present all appropriate defenses does not extend to using perjury, and that an attorney's duty to a client does not extend to assisting a client in committing perjury. Relying on DR 7–102(A)(4) of the Iowa Code of Professional Responsibility for Lawyers, which expressly prohibits an attorney from using perjured testimony, and Iowa Code § 721.2 (now Iowa Code § 720.3 (1985)), which criminalizes subornation of perjury, the Iowa court concluded that not only were Robinson's actions permissible, but were required. The court commended "both Mr. Robinson and Ms. Paulsen for the high ethical manner in which this matter was handled."

B

Whiteside then petitioned for a writ of habeas corpus in the United States District Court for the Southern District of Iowa. In that petition Whiteside alleged that he had been denied effective assistance of counsel and of his right to present a defense by Robinson's refusal to allow him to testify as he had proposed. The District Court denied the writ. Accepting the state trial court's factual finding that

Whiteside's intended testimony would have been perjurious, it concluded that there could be no grounds for habeas relief since there is no constitutional right to present a perjured defense.

The United States Court of Appeals for the Eighth Circuit reversed and directed that the writ of habeas corpus be granted. *Whiteside* v. *Scurr*, 744 F. 2d 1323 (1984). The Court of Appeals accepted the findings of the trial judge, affirmed by the Iowa Supreme Court, that trial counsel believed with good cause that Whiteside would testify falsely and acknowledged that under *Harris* v. *New York*, 401 U. S. 222 (1971), a criminal defendant's privilege to testify in his own behalf does not include a right to commit perjury. Nevertheless, the court reasoned that an intent to commit perjury, communicated to counsel, does not alter a defendant's right to effective assistance of counsel and that Robinson's admonition to Whiteside that he would inform the court of Whiteside's perjury constituted a threat to violate the attorney's duty to preserve client confidences.[3] According to the Court of Appeals, this threatened violation of client confidences breached the standards of effective representation set down in *Strickland* v. *Washington*, 466 U. S. 668 (1984). The court also concluded that *Strickland*'s prejudice requirement was satisfied by an implication of prejudice from the conflict between Robinson's duty of loyalty to his client and his ethical duties. A petition for rehearing en banc was denied, with Judges Gibson, Ross, Fagg, and Bowman dissenting. *Whiteside* v. *Scurr*, 750 F. 2d 713 (1984). We granted certiorari, 471 U. S. 1014 (1985), and we reverse.

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[3] The Court of Appeals agreed with the District Court's finding that respondent properly exhausted his claims in state court. Although respondent had pressed his claim before the Supreme Court of Iowa as a denial of his due process right to a fair trial, and not as a denial of his Sixth Amendment right to counsel, the Court of Appeals accepted the District Court's conclusion that the Sixth Amendment claim was exhausted, since further proceedings would be futile.

II

A

The right of an accused to testify in his defense is of relatively recent origin. Until the latter part of the preceding century, criminal defendants in this country, as at common law, were considered to be disqualified from giving sworn testimony at their own trial by reason of their interest as a party to the case. See, *e. g., Ferguson* v. *Georgia,* 365 U. S. 570 (1961); R. Morris, Studies in the History of American Law 59–60 (2d ed. 1959). Iowa was among the states that adhered to this rule of disqualification. *State* v. *Laffer,* 38 Iowa 422 (1874).

By the end of the 19th century, however, the disqualification was finally abolished by statute in most states and in the federal courts. Act of Mar. 16, 1878, ch. 37, 20 Stat. 30–31; see Thayer, A Chapter of Legal History in Massachusetts, 9 Harv. L. Rev. 1, 12 (1895). Although this Court has never explicitly held that a criminal defendant has a due process right to testify in his own behalf, cases in several Circuits have so held, and the right has long been assumed. See, *e. g., United States* v. *Curtis,* 742 F. 2d. 1070, 1076 (CA7 1984); *United States* v. *Bifield,* 702 F. 2d 342, 349 (CA2), cert. denied, 461 U. S. 931 (1983). We have also suggested that such a right exists as a corollary to the Fifth Amendment privilege against compelled testimony, see *Harris* v. *New York, supra,* at 225. See also *Ferguson,* 365 U. S., at 598–601 (concurring opinion of Frankfurter, J.); *id.,* at 601–603 (concurring opinion of Clark, J.).

B

In *Strickland* v. *Washington,* we held that to obtain relief by way of federal habeas corpus on a claim of a deprivation of effective assistance of counsel under the Sixth Amendment, the movant must establish both serious attorney error and prejudice. To show such error, it must be established that the assistance rendered by counsel was constitutionally deficient in that "counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U. S., at 687. To show prejudice, it must be established that the claimed lapses in counsel's performance rendered the trial unfair so as to "undermine confidence in the outcome" of the trial. *Id.*, at 694.

In *Strickland*, we acknowledged that the Sixth Amendment does not require any particular response by counsel to a problem that may arise. Rather, the Sixth Amendment inquiry is into whether the attorney's conduct was "reasonably effective." To counteract the natural tendency to fault an unsuccessful defense, a court reviewing a claim of ineffective assistance must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*, at 689. In giving shape to the perimeters of this range of reasonable professional assistance, *Strickland* mandates that

> "[p]revailing norms of practice as reflected in American Bar Association Standards and the like, . . . are guides to determining what is reasonable, but they are only guides." *Id.*, at 688.

Under the *Strickland* standard, breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel. When examining attorney conduct, a court must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into the state's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts. In some future case challenging attorney conduct in the course of a state-court trial, we may need to define with greater precision the weight to be given to recognized canons of ethics, the standards established by the state in statutes or professional codes, and the Sixth Amendment, in defining the proper scope and limits on that conduct. Here we need not face that question, since virtually all of the sources speak with one voice.

C

We turn next to the question presented: the definition of the range of "reasonable professional" responses to a criminal defendant client who informs counsel that he will perjure himself on the stand. We must determine whether, in this setting, Robinson's conduct fell within the wide range of professional responses to threatened client perjury acceptable under the Sixth Amendment.

In *Strickland*, we recognized counsel's duty of loyalty and his "overarching duty to advocate the defendant's cause." *Ibid.* Plainly, that duty is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth. Although counsel must take all reasonable lawful means to attain the objectives of the client, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law. This principle has consistently been recognized in most unequivocal terms by expositors of the norms of professional conduct since the first Canons of Professional Ethics were adopted by the American Bar Association in 1908. The 1908 Canon 32 provided:

> "No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. . . . He must . . . observe and advise his client to observe the statute law . . . ."

Of course, this Canon did no more than articulate centuries of accepted standards of conduct. Similarly, Canon 37, adopted in 1928, explicitly acknowledges as an exception to the attorney's duty of confidentiality a client's announced intention to commit a crime:

> "The announced intention of a client to commit a crime is not included within the confidences which [the attorney] is bound to respect."

These principles have been carried through to contemporary codifications[4] of an attorney's professional responsibility. Disciplinary Rule 7-102 of the Model Code of Professional Responsibility (1980), entitled "Representing a Client Within the Bounds of the Law," provides:

> "(A) In his representation of a client, a lawyer shall not:
>
> * * * * *
>
> "(4) Knowingly use perjured testimony or false evidence.
>
> * * * * *
>
> "(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent."

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[4] There currently exist two different codifications of uniform standards of professional conduct. The Model Code of Professional Responsibility was originally adopted by the American Bar Association in 1969, and was subsequently adopted (in many cases with modification) by nearly every state. The more recent Model Rules of Professional Conduct were adopted by the American Bar Association in 1983. Since their promulgation by the American Bar Association, the Model Rules have been adopted by 11 States: Arizona, Arkansas, Delaware, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, North Carolina, and Washington. See 1 ABA/BNA Lawyers' Manual on Professional Conduct 334 (1984–1985) (New Jersey); *id.*, at 445 (Arizona); *id.*, at 855 (Montana, Minnesota); *id.*, at 924 (Missouri); *id.*, at 961 (Delaware, Washington); *id.*, at 1026 (North Carolina); *id.*, at 1127 (Arkansas); 2 *id.*, at 14 (1986) (New Hampshire, Nevada). Iowa is one of the States that adopted a form of the Model Code of Professional Responsibility, but has yet to adopt the Model Rules. See Iowa Code of Professional Responsibility for Lawyers (1985).

This provision has been adopted by Iowa, and is binding on all lawyers who appear in its courts. See Iowa Code of Professional Responsibility for Lawyers (1985). The more recent Model Rules of Professional Conduct (1983) similarly admonish attorneys to obey all laws in the course of representing a client:

> "*RULE 1.2* Scope of Representation
>
> . . . . .
>
> "(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . . ."

Both the Model Code of Professional Responsibility and the Model Rules of Professional Conduct also adopt the specific exception from the attorney-client privilege for disclosure of perjury that his client intends to commit or has committed. DR 4–101(C)(3) (intention of client to commit a crime); Rule 3.3 (lawyer has duty to disclose falsity of evidence even if disclosure compromises client confidences). Indeed, both the Model Code and the Model Rules do not merely *authorize* disclosure by counsel of client perjury; they *require* such disclosure. See Rule 3.3(a)(4); DR 7–102(B)(1); *Committee on Professional Ethics and Conduct of Iowa State Bar Assn.* v. *Crary*, 245 N. W. 2d 298 (Iowa 1976).

These standards confirm that the legal profession has accepted that an attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct; it specifically ensures that the client may not use false evidence.[5] This special duty of an attorney to prevent and disclose frauds upon the court derives from the recognition that perjury is as much a crime as tampering with witnesses or jurors by way of promises and threats, and undermines the administration of justice. See 1 W. Burdick, Law of Crime §§293, 300, 318–336 (1946).

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[5] The brief of *amicus* American Bar Association, which supports petitioner, makes this point, referring to the history of codes of professional conduct which it has promulgated. The preamble to the most current version of the ethical standards recognizes the difficult choices that may confront an attorney who is sensitive to his concurrent duties to his client and to the legal system:

The offense of perjury was a crime recognized at common law, *id.*, at p. 475, and has been made a felony in most states by statute, including Iowa. Iowa Code §720.2 (1985). See generally 4 C. Torcia, Wharton's Criminal Law §631 (14th ed. 1981). An attorney who aids false testimony by questioning a witness when perjurious responses can be anticipated risks prosecution for subornation of perjury under Iowa Code §720.3 (1985).

It is universally agreed that at a minimum the attorney's first duty when confronted with a proposal for perjurious testimony is to attempt to dissuade the client from the unlawful course of conduct. Model Rules of Professional Conduct, Rule 3.3, Comment; Wolfram, Client Perjury, 50 S. Cal. L. Rev. 809, 846 (1977). A statement directly in point is found in the commentary to the Model Rules of Professional Conduct under the heading "False Evidence":

> "When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer *should seek to persuade the client that the evidence should not be offered* or, if it has been offered, that its false character should immediately be disclosed." Model Rules of Professional Conduct, Rule 3.3, Comment (1983) (emphasis added).

"Within the framework of these Rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules." Preamble, Model Rules of Professional Conduct, p. 10 (1983).

The commentary thus also suggests that an attorney's revelation of his client's perjury to the court is a professionally responsible and acceptable response to the conduct of a client who has actually given perjured testimony. Similarly, the Model Rules and the commentary, as well as the Code of Professional Responsibility adopted in Iowa, expressly permit withdrawal from representation as an appropriate response of an attorney when the client threatens to commit perjury. Model Rules of Professional Conduct, Rule 1.16(a)(1), Rule 1.6, Comment (1983); Code of Professional Responsibility, DR 2-110(B), (C) (1980). Withdrawal of counsel when this situation arises at trial gives rise to many difficult questions including possible mistrial and claims of double jeopardy.[6]

The essence of the brief *amicus* of the American Bar Association reviewing practices long accepted by ethical lawyers is that under no circumstance may a lawyer either advocate or passively tolerate a client's giving false testimony. This, of course, is consistent with the governance of trial conduct in what we have long called "a search for truth." The suggestion sometimes made that "a lawyer must believe his client, not judge him" in no sense means a lawyer can honorably be a party to or in any way give aid to presenting known perjury.

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[6] In the evolution of the contemporary standards promulgated by the American Bar Association, an early draft reflects a compromise suggesting that when the disclosure of intended perjury is made during the course of trial, when withdrawal of counsel would raise difficult questions of a mistrial holding, counsel had the option to let the defendant take the stand but decline to affirmatively assist the presentation of perjury by traditional direct examination. Instead, counsel would stand mute while the defendant undertook to present the false version in narrative form in his own words unaided by any direct examination. This conduct was thought to be a signal at least to the presiding judge that the attorney considered the testimony to be false and was seeking to disassociate himself from that course. Additionally, counsel would not be permitted to discuss the known false testimony in closing arguments. See ABA Standards for Criminal Justice, Proposed Standard 4-7.7 (2d ed. 1980). Most courts treating the subject rejected this approach and insisted on a more rigorous standard, see, *e. g.*, *United States* v. *Curtis*, 742 F. 2d 1070 (CA7 1984); *McKissick* v. *United States*, 379 F. 2d 754 (CA5 1967); *Dodd* v. *Florida Bar*, 118 So. 2d 17, 19 (Fla. 1960). The Eighth Circuit in this case and the Ninth Circuit have expressed approval of the "free narrative" standards. *Whiteside* v. *Scurr*, 744 F. 2d 1323, 1331 (CA8 1984); *Lowery* v. *Cardwell*, 575 F. 2d 727 (CA9 1978).

The Rule finally promulgated in the current Model Rules of Professional Conduct rejects any participation or passive role whatever by counsel in allowing perjury to be presented without challenge.

D

Considering Robinson's representation of respondent in light of these accepted norms of professional conduct, we discern no failure to adhere to reasonable professional standards that would in any sense make out a deprivation of the Sixth Amendment right to counsel. Whether Robinson's conduct is seen as a successful attempt to dissuade his client from committing the crime of perjury, or whether seen as a "threat" to withdraw from representation and disclose the illegal scheme, Robinson's representation of Whiteside falls well within accepted standards of professional conduct and the range of reasonable professional conduct acceptable under *Strickland.*

The Court of Appeals assumed for the purpose of the decision that Whiteside would have given false testimony had counsel not intervened; its opinion denying a rehearing en banc states:

> "[W]e presume that appellant would have testified falsely.
>
> . . . . .
>
> ". . . Counsel's actions prevented [Whiteside] from testifying falsely. We hold that counsel's action deprived appellant of due process and effective assistance of counsel.
>
> . . . . .
>
> "Counsel's actions also impermissibly compromised appellant's right to testify in his own defense by conditioning continued representation by counsel and confidential-

> ity upon appellant's restricted testimony." 750 F. 2d., at 714–715.

While purporting to follow Iowa's highest court "on all questions of state law," 744 F. 2d., at 1330, the Court of Appeals reached its conclusions on the basis of federal constitutional due process and right to counsel.

The Court of Appeals' holding that Robinson's "action deprived [Whiteside] of due process and effective assistance of counsel" is not supported by the record since Robinson's action, at most, deprived Whiteside of his contemplated perjury. Nothing counsel did in any way undermined Whiteside's claim that he believed the victim was reaching for a gun. Similarly, the record gives no support for holding that Robinson's action "also impermissibly compromised [Whiteside's] right to testify in his own defense by conditioning continued representation . . . and confidentiality upon [Whiteside's] *restricted* testimony." The record in fact shows the contrary: (a) that Whiteside did testify, and (b) he was "restricted" or restrained only from testifying falsely and was aided by Robinson in developing the basis for the fear that Love was reaching for a gun. Robinson divulged no client communications until he was compelled to do so in response to Whiteside's post-trial challenge to the quality of his performance. We see this as a case in which the attorney successfully dissuaded the client from committing the crime of perjury.

Paradoxically, even while accepting the conclusion of the Iowa trial court that Whiteside's proposed testimony would have been a criminal act, the Court of Appeals held that Robinson's efforts to persuade Whiteside not to commit that crime were improper, *first,* as forcing an impermissible choice between the right to counsel and the right to testify; and, *second,* as compromising client confidences because of Robinson's threat to disclose the contemplated perjury.[7]

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[7] The Court of Appeals also determined that Robinson's efforts to persuade Whiteside to testify truthfully constituted an impermissible threat to testify against his own client. We find no support for a threat to testify

Whatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying *falsely*. In *Harris* v. *New York*, we assumed the right of an accused to testify "in his own defense, or to refuse to do so" and went on to hold:

> "[T]hat privilege cannot be construed to include the right to commit perjury. See *United States* v. *Knox*, 396 U. S. 77 (1969); cf. *Dennis* v. *United States*, 384 U. S. 855 (1966). Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully . . . ." 401 U. S., at 225.

In *Harris* we held the defendant could be impeached by prior contrary statements which had been ruled inadmissible under *Miranda* v. *Arizona*, 384 U. S. 436 (1966). *Harris* and other cases make it crystal clear that there is no right whatever—constitutional or otherwise—for a defendant to use false evidence. See also *United States* v. *Havens*, 446 U. S. 620, 626–627 (1980).

The paucity of authority on the subject of any such "right" may be explained by the fact that such a notion has never been responsibly advanced; the right to counsel includes no right to have a lawyer who will cooperate with planned perjury. A lawyer who would so cooperate would be at risk of prosecution for suborning perjury, and disciplinary proceedings, including suspension or disbarment.

Robinson's admonitions to his client can in no sense be said to have forced respondent into an *impermissible* choice between his right to counsel and his right to testify as he proposed for there was no *permissible* choice to testify falsely. For defense counsel to take steps to persuade a criminal defendant to testify truthfully, or to withdraw, deprives the defendant of neither his right to counsel nor the right to

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against Whiteside while he was acting as counsel. The record reflects testimony by Robinson that he had admonished Whiteside that if he withdrew he "probably would be allowed to attempt to impeach that particular testimony," if Whiteside testified falsely. The trial court accepted this version of the conversation as true.

testify truthfully. In *United States* v. *Havens*, *supra*, we made clear that "when defendants testify, they must testify truthfully or suffer the consequences." *Id.*, at 626. When an accused proposes to resort to perjury or to produce false evidence, one consequence is the risk of withdrawal of counsel.

On this record, the accused enjoyed continued representation within the bounds of reasonable professional conduct and did in fact exercise his right to testify; at most he was denied the right to have the assistance of counsel in the presentation of false testimony. Similarly, we can discern no breach of professional duty in Robinson's admonition to respondent that he would disclose respondent's perjury to the court. The crime of perjury in this setting is indistinguishable in substance from the crime of threatening or tampering with a witness or a juror. A defendant who informed his counsel that he was arranging to bribe or threaten witnesses or members of the jury would have no "right" to insist on counsel's assistance or silence. Counsel would not be limited to advising against that conduct. An attorney's duty of confidentiality, which totally covers the client's admission of guilt, does not extend to a client's announced plans to engage in future criminal conduct. See *Clark* v. *United States*, 289 U. S. 1, 15 (1933). In short, the responsibility of an ethical lawyer, as an officer of the court and a key component of a system of justice, dedicated to a search for truth, is essentially the same whether the client announces an intention to bribe or threaten witnesses or jurors or to commit or procure perjury. No system of justice worthy of the name can tolerate a lesser standard.

The rule adopted by the Court of Appeals, which seemingly would require an attorney to remain silent while his client committed perjury, is wholly incompatible with the established standards of ethical conduct and the laws of Iowa and contrary to professional standards promulgated by that State. The position advocated by petitioner, on the contrary, is wholly consistent with the Iowa standards of professional conduct and law, with the overwhelming majority of courts,[8] and with codes of professional ethics. Since there has been no breach of any recognized professional duty, it follows that there can be no deprivation of the right to assistance of counsel under the *Strickland* standard.

E

We hold that, as a matter of law, counsel's conduct complained of here cannot establish the prejudice required for relief under the second strand of the *Strickland* inquiry. Although a defendant need not establish that the attorney's deficient performance more likely than not altered the outcome in order to establish prejudice under *Strickland*, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U. S., at 694. According to *Strickland*, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Ibid.* The *Strickland* Court noted that the "benchmark" of an ineffective-assistance claim is the fairness of the adversary proceeding, and that in judging prejudice and the likelihood of a different outcome, "[a] defendant has no entitlement to the luck of a lawless decisionmaker." *Id.*, at 695.

Whether he was persuaded or compelled to desist from perjury, Whiteside has no valid claim that confidence in the result of his trial has been diminished by his desisting from the contemplated perjury. Even if we were to assume that the jury might have believed his perjury, it does not follow that Whiteside was prejudiced.

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[8] See *United States* v. *Curtis*, 742 F. 2d 1070 (CA7 1984); *Committee on Professional Ethics* v. *Crary*, 245 N. W. 2d 298 (Iowa 1976); *State* v. *Robinson*, 290 N. C. 56, 224 S. E. 2d 174 (1976); *Thornton* v. *United States*, 357 A. 2d 429 (D. C. 1976); *State* v. *Henderson*, 205 Kan. 231, 468 P. 2d 136 (1970); *McKissick* v. *United States*, 379 F. 2d 754 (CA5 1967); *In re King*, 7 Utah 2d 258, 322 P. 2d 1095 (1958); *In re Carroll*, 244 S. W. 2d 474 (Ky. 1951); *Hinds* v. *State Bar*, 19 Cal. 2d 87, 119 P. 2d 134 (1941). Contra, *Whiteside* v. *Scurr*, 744 F. 2d 1323 (CA8 1984) (case below); *Lowery* v. *Cardwell*, 575 F. 2d 727 (CA9 1978).

In his attempt to evade the prejudice requirement of *Strickland*, Whiteside relies on cases involving conflicting loyalties of counsel. In *Cuyler* v. *Sullivan*, 446 U. S. 335 (1980), we held that a defendant could obtain relief without pointing to a specific prejudicial default on the part of his counsel, provided it is established that the attorney was "actively represent[ing] conflicting interests." *Id.*, at 350.

Here, there was indeed a "conflict," but of a quite different kind; it was one imposed on the attorney by the client's proposal to commit the crime of fabricating testimony without which, as he put it, "I'm dead." This is not remotely the kind of conflict of interests dealt with in *Cuyler* v. *Sullivan*. Even in that case we did not suggest that all multiple representations necessarily resulted in an active conflict rendering the representation constitutionally infirm. If a "conflict" between a client's proposal and counsel's ethical obligation gives rise to a presumption that counsel's assistance was prejudicially ineffective, every guilty criminal's conviction would be suspect if the defendant had sought to obtain an acquittal by illegal means. Can anyone doubt what practices and problems would be spawned by such a rule and what volumes of litigation it would generate?

Whiteside's attorney treated Whiteside's proposed perjury in accord with professional standards, and since Whiteside's truthful testimony could not have prejudiced the result of his trial, the Court of Appeals was in error to direct the issuance of a writ of habeas corpus and must be reversed.

Reversed.

JUSTICE BRENNAN, concurring in the judgment.

This Court has no constitutional authority to establish rules of ethical conduct for lawyers practicing in the state courts. Nor does the Court enjoy any statutory grant of jurisdiction over legal ethics.

Accordingly, it is not surprising that the Court emphasizes that it "must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into the state's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts." *Ante*, at 165. I read this as saying in another way that the Court *cannot* tell the States or the lawyers in the States how to behave in their courts, unless and until federal rights are violated.

Unfortunately, the Court seems unable to resist the temptation of sharing with the legal community its vision of ethical conduct. But let there be no mistake: the Court's essay regarding what constitutes the correct response to a criminal client's suggestion that he will perjure himself is pure discourse without force of law. As JUSTICE BLACKMUN observes, *that* issue is a thorny one, *post*, at 177–178, but it is not an issue presented by this case. Lawyers, judges, bar associations, students, and others should understand that the problem has not now been "decided."

I join JUSTICE BLACKMUN's concurrence because I agree that respondent has failed to prove the kind of prejudice necessary to make out a claim under *Strickland* v. *Washington*, 466 U. S. 668 (1984).

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS join, concurring in the judgment.

How a defense attorney ought to act when faced with a client who intends to commit perjury at trial has long been a controversial issue.[1] But I do not believe that a federal habeas corpus case challenging a state criminal conviction is an appropriate vehicle for attempting to resolve this thorny problem. When a defendant argues that he was denied effective assistance of counsel because his lawyer dissuaded him from committing perjury, the only question properly presented to this Court is whether the lawyer's actions deprived the defendant of the fair trial which the Sixth Amendment is meant to guarantee. Since I believe that the respondent in this case suffered no injury justifying federal habeas relief, I concur in the Court's judgment.

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[1] See, *e. g.*, Callan & David, Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System, 29 Rutgers L. Rev. 332 (1976); Rieger, Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues, 70 Minn. L. Rev. 121 (1985); compare, *e. g.*, Freedman, Professional Responsibility of the Criminal De-

I

On February 7, 1977, Emmanual Charles Whiteside stabbed Calvin Love to death. At trial, Whiteside claimed self-defense. On direct examination, he testified that Love's bedroom, where the stabbing had occurred, was "[v]ery much dark," App. 48, and that he had stabbed Love during an argument because he believed that Love was about to attack him with a weapon:

> "Q. Did you think that Calvin had a gun?
> "A. Most definitely I thought that.
> "Q. Why did you think that?
> "A. Because of Calvin's reputation, his brother's reputation, because of the prior conversation that Calvin and I had, I didn't have no other choice but to think he had a gun. And when he told his girl friend to give him his piece, I couldn't retreat." *Id.*, at 50.

Whiteside's testimony was consistent with that of other witnesses who testified that the room was dark, and that Love

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fense Lawyer: The Three Hardest Questions, 64 Mich. L. Rev. 1469 (1966), and ABA Standards for Criminal Justice, Proposed Standard 4–7.7 (2d ed. 1980) (approved by the Standing Committee on Association Standards for Criminal Justice, but not yet submitted to the House of Delegates), with Noonan, The Purposes of Advocacy and the Limits of Confidentiality, 64 Mich. L. Rev. 1485 (1966), and ABA Model Rules of Professional Conduct, Rule 3.3 and comment, at 66–67 (1983).

had asked his girlfriend to get his "piece" (which they all believed referred to a weapon). See, *e. g.*, *id.*, at 17–18, 20, 36–37, and 42–45. No gun, however, was ever found.

Whiteside, who had been charged with first-degree murder, was convicted of second-degree murder, and sentenced to 40 years' imprisonment. He moved for a new trial, contending that his court-appointed attorneys, Gary Robinson and Donna Paulsen, had improperly coerced his testimony. Whiteside now claimed that he had seen a gun, but had been prevented from testifying to this fact.

At an evidentiary hearing on this motion, Whiteside testified that he had told Robinson at their first meeting that he had seen a weapon in Love's hand. Some weeks later, Robinson informed Whiteside that the weapon could not be found and, according to Whiteside, told him to say only that he thought he had seen a gun, rather than that he in fact had seen one. Whiteside "got the impression at one time that maybe if I didn't go along with—with what was happening, that it was no gun being involved, maybe that he will pull out of my trial." App. to Pet. for Cert. A70.

Robinson's testimony contradicted Whiteside's. According to Robinson, Whiteside did not initially claim to have seen a gun, but rather claimed only that he was convinced Love had had one. Roughly a week before the trial, however, in the course of reviewing Whiteside's testimony, Whiteside "made reference to seeing something 'metallic' . . . . I don't think he ever did say a gun." *Id.*, at A85:

> "And at the end Donna asked him about that, because that was the first time it had ever been mentioned either to her or to myself. His response to that was, 'in Howard Cook's case there was a gun. If I don't say I saw a gun, I'm dead.' I explained to him at that time that it was not necessary that the gun be physically present for self-defense, one; two, that to say that would be perjury on his part because he had never at any time indicated that there was a gun . . . ; three, that we could not allow

> him to do that . . . ; four, I advised him that if he did do that it would be my duty to advise the Court of what he was doing . . . ; also, that I probably would be allowed to attempt to impeach that particular testimony. I told him that there was no need for him to lie about what had happened, that he had a good and valid defense on the facts as he had related them to us, and we felt we could present a good self-defense case on the facts he had stated to us." *Ibid.*

Robinson acknowledged that Whiteside's claim of self-defense would have been stronger had the gun been found, but explained that at trial "we tried to create a gun," through testimony from people who had seen Love carrying a gun on other occasions, through a stipulation that Love had been convicted of possession of a weapon, and through suggestions made during cross-examination of the State's witnesses that the initial police search had been too cursory to discover the weapon and that Love's girlfriend had removed it from the apartment prior to a second, more thorough, search. *Id.*, at A87–A88.

The trial court rejected Whiteside's motion for a new trial, "find[ing] the facts to be as testified to by Ms. Paulsen and Mr. Robinson." App. 57. The Iowa Supreme Court affirmed. *State* v. *Whiteside*, 272 N. W. 2d 468 (1978).

Whiteside then sought federal habeas relief in the United States District Court for the Southern District of Iowa. The parties agreed to rest on the record made in the state-court proceedings. Chief Judge Stuart held that the trial judge's factual finding that Whiteside would have committed perjury had he testified at trial actually to having seen a gun was fairly supported by the record and thus entitled to a presumption of correctness. See 28 U. S. C. § 2254(d). Since Whiteside had no constitutional right to perjure himself, he had been denied neither a fair trial nor effective assistance of counsel. App. to Pet. for Cert. A41.

The Court of Appeals for the Eighth Circuit reversed. *Whiteside* v. *Scurr*, 744 F. 2d 1323 (1984). The court recognized that the issue before it was not whether Robinson had behaved ethically,[2] but rather whether Whiteside had been deprived of effective assistance of counsel. *Id.*, at 1330. In the Court of Appeals' view, Robinson had breached the obligations of confidentiality and zealous advocacy imposed on defense counsel by the Sixth Amendment. In addition, the Court of Appeals concluded that Robinson's actions impermissibly compromised Whiteside's constitutional right to testify in his own behalf by conditioning continued representation and confidentiality on Whiteside's limiting his testimony.

The court recognized that, under *Strickland* v. *Washington*, 466 U. S. 668 (1984), a defendant must normally demonstrate both that his attorney's behavior was professionally unreasonable and that he was prejudiced by his attorney's unprofessional behavior. But it noted that *Strickland* v. *Washington* had recognized a "limited" presumption of prejudice when counsel is burdened by an actual conflict of interest that adversely affects his performance, see *id.*, at 692, quoting *Cuyler* v. *Sullivan*, 446 U. S. 335, 348, 350 (1980). Here, Whiteside had shown that Robinson's obligations under the Iowa Code of Professional Responsibility conflicted with his client's wishes, and his threat to testify against Whiteside had adversely affected Whiteside by "undermin[ing] the fundamental trust between lawyer and client" necessary for effective representation. 744 F. 2d, at 1330.

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[2] The court stated:

"That question is governed solely by the Iowa Code of Professional Responsibility, as it was in effect at the time of the trial in this case, and as it has been authoritatively interpreted by the Supreme Court of Iowa. The Supreme Court of Iowa is the last word on all questions of state law, and the Code of Professional Responsibility is a species of state law." 744 F. 2d, at 1330.

Thus, the court declined to address the question whether Robinson's actions were either compelled or condoned by Iowa law.

Petitioner's motion for rehearing en banc was denied by a vote of 5 to 4. *Whiteside* v. *Scurr*, 750 F. 2d 713 (CA8 1984). In dissent, Judge John R. Gibson, joined by Judges Ross, Fagg, and Bowman, argued that Whiteside had failed to show cognizable prejudice. *Cuyler* v. *Sullivan* was inapposite, both because finding a conflict of interest required making the untenable assumption that Whiteside possessed the right to testify falsely and because Robinson's threat had had no adverse effect on the trial since Whiteside testified fully in his defense. Moreover, the result of the proceeding should not have been different had Whiteside been permitted to testify as he wished.

A separate dissent by Judge Fagg, joined by Judges Ross, John R. Gibson, and Bowman, addressed the performance prong of *Strickland*. Robinson's admonition to Whiteside to testify truthfully simply could not be viewed as creating a conflict of interest; Robinson presented a full and zealous defense at trial; and, although Robinson's warning to Whiteside may have been "strident," 750 F. 2d, at 718, he had communicated with his client in a manner the client understood.

II

A

The District Court found that the trial judge's statement that "I find the facts to be as testified to by Ms. Paulsen and Mr. Robinson" was a factual finding that Whiteside "would have perjured himself if he had testified at trial that he actually saw a gun in his victim's hand." App. to Pet. for Cert. A42. This factual finding by the state court is entitled to a presumption of correctness under 28 U. S. C. § 2254(d), which Whiteside has not overcome.

Respondent has never attempted to rebut the presumption by claiming that the factfinding procedure employed by Iowa in considering new trial motions in any sense deprived him of a full and fair hearing or failed to provide a sufficient basis for denying his motion.[3] Although respondent's argument to this Court in large part assumes that the precluded testimony would have been false, see Brief for Respondent 10–11, he contends, first, that the record does not fairly support the conclusion that he intended to perjure himself because he claimed in his first written statement that Love had been pulling a pistol from under a pillow at the time of the stabbing, see App. 55, and, second, that whether Robinson had sufficient knowledge to conclude he was going to commit perjury was a mixed question of law and fact to which the presumption of correctness does not apply.

Neither contention overcomes the presumption of correctness due the state court's finding. First, the trial judge's implicit decision not to credit the written statement is fairly supported by Robinson's testimony that the written statement had not been prepared by Whiteside alone and that, from the time of their initial meeting until the week before trial, Whiteside never again claimed to have seen a gun. See App. to Pet. for Cert. A78–A79. Second, the finding properly accorded a presumption of correctness by the courts below was that Whiteside's "proposed testimony would [have been] deliberately untruthful." *State* v. *Whiteside*, 272 N. W. 2d, at 471. The lower courts did not purport to presume the correctness of the Iowa Supreme Court's holding concerning the mixed question respondent identifies—whether Robinson's response to Whiteside's proposed testimony deprived Whiteside of effective representation.

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[3] Whiteside's motion for a new trial rested on his recantation of his testimony at trial. As a matter of Iowa law, when a trial judge is faced with a motion for a new trial based on a witness' recantation of his trial testimony, the judge must decide whether the recantation is believable:

> "The trial court is not required to believe the recantation, but must make its decision on the basis of the whole trial and the matters presented on the hearing on the motion. Premised thereon, if it believes the [post conviction] statements . . . are false, and is not reasonably well satisfied that the testimony given by the witness on the trial was false, it should deny the motion, and it is not at liberty to shift upon the shoulders of another jury the responsibility to seek out the truth of that matter." *State* v. *Compiano*, 261 Iowa 509, 517, 154 N. W. 2d 845, 849 (1967).

See also, *e. g.*, *State* v. *Taylor*, 287 N. W. 2d 576, 578 (Iowa 1980); *State* v. *McGhee*, 280 N. W. 2d 436, 442 (Iowa 1979), cert. denied, 444 U. S. 1039 (1980); cf. *United States* v. *Johnson*, 327 U. S. 106, 110–111 (1946).

B

The Court approaches this case as if the performance-and-prejudice standard requires us in every case to determine "the perimeters of [the] range of reasonable professional assistance," *ante*, at 165, but *Strickland* v. *Washington* explicitly contemplates a different course:

> "Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." 466 U. S., at 697.

See also *Hill* v. *Lockhart*, 474 U. S. 52, 60 (1985). In this case, respondent has failed to show any legally cognizable prejudice. Nor, as is discussed below, is this a case in which prejudice should be presumed.

The touchstone of a claim of prejudice is an allegation that counsel's behavior did something "to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland* v. *Washington*, 466 U. S., at 687. The only effect Robinson's threat had on Whiteside's trial is that Whiteside did not testify, falsely, that he saw a gun in Love's hand.[4] Thus, this Court must ask whether its confidence in the outcome of Whiteside's trial is in any way undermined by the knowledge that he refrained from presenting false testimony. See *id.*, at 694.

This Court long ago noted: "All perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth. Therefore it cannot be denied that it tends to defeat the sole ultimate objective of a trial." *In re Michael*, 326 U. S. 224, 227 (1945). When the Court has been faced with a claim by a defendant concerning prosecutorial use of such evidence, it has "consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury" (footnote omitted). *United States* v. *Agurs*, 427 U. S. 97, 103 (1976). See also, *e. g.*, *Napue* v. *Illinois*, 360 U. S. 264, 269 (1959); *Pyle* v. *Kansas*, 317 U. S. 213, 216 (1942); *Mooney* v. *Holohan*, 294 U. S. 103, 112 (1935). Similarly, the Court has viewed a defendant's use of such testimony as so antithetical to our system of justice that it has permitted the prosecution to introduce otherwise inadmissible evidence to combat it. See, *e. g.*, *United States* v. *Havens*, 446 U. S. 620, 626–627 (1980); *Oregon* v. *Hass*, 420 U. S. 714, 720–723 (1975); *Harris* v. *New York*, 401 U. S. 222, 225–226 (1971); *Walder* v. *United States*, 347 U. S. 62, 65 (1954). The proposition that presenting false evidence could contribute to (or that withholding such evidence could detract from) the reliability of a criminal trial is simply untenable.

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[4] This is not to say that a lawyer's threat to reveal his client's confidences may never have other effects on a defendant's trial. Cf. *United States ex rel. Wilcox* v. *Johnson*, 555 F. 2d 115 (CA3 1977) (finding a violation of Sixth Amendment when an attorney's threat to reveal client's purported perjury caused defendant not to take the stand at all).

It is no doubt true that juries sometimes have acquitted defendants who should have been convicted, and sometimes have based their decisions to acquit on the testimony of defendants who lied on the witness stand. It is also true that the Double Jeopardy Clause bars the reprosecution of such acquitted defendants, although on occasion they can be prosecuted for perjury. See, *e. g.*, *United States* v. *Williams*, 341 U. S. 58, 63–65 (1951). But the privilege every criminal defendant has to testify in his own defense "cannot be construed to include the right to commit perjury." *Harris* v. *New York*, 401 U. S., at 225.[5] To the extent that Whiteside's claim rests on the assertion that he would have been acquitted had he been able to testify falsely, Whiteside claims a right the law simply does not recognize. "A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed." *Strickland* v. *Washington*, 466 U. S., at 695. Since Whiteside was deprived of neither a fair trial nor any of the specific constitutional rights designed to guarantee a fair trial, he has suffered no prejudice.

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[5] Whiteside was not deprived of the right to testify in his own defense, since no suggestion has been made that Whiteside's testimony was restricted in any way beyond the fact that he did not claim, falsely, to have seen a gun in Love's hand.

I must confess that I am somewhat puzzled by the Court's implicit suggestion that whether a defendant has a constitutional right to testify in his own defense remains an open question. *Ante*, at 164. It is true that in *Ferguson* v. *Georgia*, 365 U. S. 570 (1961), the Court expressly declined to address the question of a defendant's constitutional right to testify, but that was because the case did not properly raise the issue. *Id.*, at 572, n. 1. Since then, the Court repeatedly has referred to the existence of such a right. See, *e. g.*, *Jones* v. *Barnes*, 463 U. S. 745, 751 (1983) (the defendant has the "ultimate authority to make certain fundamental decisions regarding the case, [such as] . . . whether to . . . testify in his or her own behalf"); *Brooks* v. *Tennessee*, 406 U. S. 605, 612 (1972) ("Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right"); *Harris* v. *New York*. I cannot imagine that if we were presented with a state statute that prohibited a defendant from testifying at his own trial, we would not rule that it violates both the Sixth and Fourteenth Amendments, as well as, perhaps, the Fifth.

The Court of Appeals erred in concluding that prejudice should have been presumed. *Strickland* v. *Washington* found such a presumption appropriate in a case where an attorney labored under "'an actual conflict of interest [that] adversely affected his . . . performance,'" *id.*, at 692, quoting *Cuyler* v. *Sullivan*, 446 U. S., at 348. In this case, however, no actual conflict existed. I have already discussed why Whiteside had no right to Robinson's help in presenting perjured testimony. Moreover, Whiteside has identified no right to insist that Robinson keep confidential a plan to commit perjury. See *Committee on Professional Ethics and Conduct of Iowa State Bar Assn.* v. *Crary*, 245 N. W. 2d 298, 306 (Iowa 1976). The prior cases where this Court has reversed convictions involved conflicts that infringed a defendant's legitimate interest in vigorous protection of his constitutional rights. See, *e. g.*, *Wood* v. *Georgia*, 450 U. S. 261, 268–271 (1981) (defense attorney paid by defendants' employer might have pursued employer's interest in litigating a test case rather than obtaining leniency for his clients by cooperating with prosecution); *Glasser* v. *United States*, 315 U. S. 60, 72–75 (1942) (defense attorney who simultaneously represented two defendants failed to object to certain potentially inadmissible evidence or to cross-examine a prosecution witness in an apparent attempt to minimize one codefendant's guilt). Here, Whiteside had no legitimate interest that conflicted with Robinson's obligations not to suborn perjury and to adhere to the Iowa Code of Professional Responsibility.

In addition, the lawyer's interest in not presenting perjured testimony was entirely consistent with Whiteside's best interest. If Whiteside had lied on the stand, he would have risked a future perjury prosecution. Moreover, his testimony would have been contradicted by the testimony of other eyewitnesses and by the fact that no gun was ever found. In light of that impeachment, the jury might have concluded that Whiteside lied as well about his lack of premeditation and thus might have convicted him of first-degree murder. And if the judge believed that Whiteside had lied, he could have taken Whiteside's perjury into account in setting the sentence. *United States* v. *Grayson*, 438 U. S. 41, 52–54 (1978).[6] In the face of these dangers, an attorney could reasonably conclude that dissuading his client from committing perjury was in the client's best interest and comported with standards of professional responsibility.[7] In short, Whiteside failed to show the kind of conflict that poses a danger to the values of zealous and loyal representation embodied in the Sixth Amendment. A presumption of prejudice is therefore unwarranted.

C

In light of respondent's failure to show any cognizable prejudice, I see no need to "grade counsel's performance." *Strickland* v. *Washington*, 466 U. S., at 697. The only federal issue in this case is whether Robinson's behavior deprived Whiteside of the effective assistance of counsel; it is not whether Robinson's behavior conformed to any particular code of legal ethics.

Whether an attorney's response to what he sees as a client's plan to commit perjury violates a defendant's Sixth Amendment rights may depend on many factors: how certain the attorney is that the proposed testimony is false, the stage of the proceedings at which the attorney discovers the plan, or the ways in which the attorney may be able to dissuade his client, to name just three. The complex interaction of factors, which is likely to vary from case to case, makes inappropriate a blanket rule that defense attorneys must reveal, or threaten to reveal, a client's anticipated perjury to the court. Except in the rarest of cases, attorneys who adopt "the role of the judge or jury to determine the facts," *United States ex rel. Wilcox* v. *Johnson*, 555 F. 2d 115, 122 (CA3 1977), pose a danger of depriving their clients of the zealous and loyal advocacy required by the Sixth Amendment.[8]

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[6] In fact, the State apparently asked the trial court to impose a sentence of 75 years, see Tr. 4 (Aug. 26, 1977), but the judge sentenced Whiteside to 40 years' imprisonment instead.

[7] This is not to say that an attorney's ethical obligations will never conflict with a defendant's right to effective assistance. For example, an attorney who has previously represented one of the State's witnesses has a continuing obligation to that former client not to reveal confidential information received during the course of the prior representation. That continuing duty could conflict with his obligation to his present client, the defendant, to cross-examine the State's witnesses zealously. See Lowenthal, Successive Representation by Criminal Lawyers, 93 Yale L. J. 1 (1983).

I therefore am troubled by the Court's implicit adoption of a set of standards of professional responsibility for attorneys in state criminal proceedings. See *ante*, at 168–171. The States, of course, do have a compelling interest in the integrity of their criminal trials that can justify regulating the length to which an attorney may go in seeking his client's acquittal. But the American Bar Association's implicit suggestion in its brief *amicus curiae* that the Court find that the Association's Model Rules of Professional Conduct should govern an attorney's responsibilities is addressed to the wrong audience. It is for the States to decide how attorneys should conduct themselves in state criminal proceedings, and this Court's responsibility extends only to ensuring that the restrictions a State enacts do not infringe a defendant's federal constitutional rights. Thus, I would follow the suggestion made in the joint brief *amici curiae* filed by 37 States at the certiorari stage that we allow the States to maintain their "differing approaches" to a complex ethical question. Brief for State of Indiana et al. as *Amici Curiae* 5. The signal merit of asking first whether a defendant has shown any adverse prejudicial effect before inquiring into his attorney's performance is that it avoids unnecessary federal interference in a State's regulation of its bar. Because I conclude that the respondent in this case failed to show such an effect, I join the Court's judgment that he is not entitled to federal habeas relief.

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[8] A comparison of this case with *Wilcox* is illustrative. Here, Robinson testified in detail to the factors that led him to conclude that respondent's assertion he had seen a gun was false. See, *e. g.*, Tr. 38–39, 43, 59 (July 29, 1977). The Iowa Supreme Court found "good cause" and "strong support" for Robinson's conclusion. *State* v. *Whiteside*, 272 N. W. 2d 468, 471 (1978). Moreover, Robinson gave credence to those parts of Whiteside's account which, although he found them implausible and unsubstantiated, were not clearly false. See Tr. 52–53 (July 29, 1977). By contrast, in *Wilcox*, where defense counsel actually informed the judge that she believed her client intended to lie and where her threat to withdraw in the middle of the trial led the defendant not to take the stand at all, the Court of Appeals found "no evidence on the record of this case indicating that Mr. Wilcox intended to perjure himself," and characterized counsel's beliefs as "private conjectures about the guilt or innocence of [her] client." 555 F. 2d, at 122.

JUSTICE STEVENS, concurring in the judgment.

Justice Holmes taught us that a word is but the skin of a living thought. A "fact" may also have a life of its own. From the perspective of an appellate judge, after a case has been tried and the evidence has been sifted by another judge, a particular fact may be as clear and certain as a piece of crystal or a small diamond. A trial lawyer, however, must often deal with mixtures of sand and clay. Even a pebble that seems clear enough at first glance may take on a different hue in a handful of gravel.

As we view this case, it appears perfectly clear that respondent intended to commit perjury, that his lawyer knew it, and that the lawyer had a duty—both to the court and to his client, for perjured testimony can ruin an otherwise meritorious case—to take extreme measures to prevent the perjury from occurring. The lawyer was successful and, from our unanimous and remote perspective, it is now pellucidly clear that the client suffered no "legally cognizable prejudice."

Nevertheless, beneath the surface of this case there are areas of uncertainty that cannot be resolved today. A lawyer's certainty that a change in his client's recollection is a harbinger of intended perjury—as well as judicial review of such apparent certainty—should be tempered by the realization that, after reflection, the most honest witness may recall (or sincerely believe he recalls) details that he previously overlooked. Similarly, the post-trial review of a lawyer's pretrial threat to expose perjury that had not yet been committed—and, indeed, may have been prevented by the threat—is by no means the same as review of the way in which such a threat may actually have been carried out. Thus, one can be convinced—as I am—that this lawyer's actions were a proper way to provide his client with effective representation without confronting the much more difficult questions of what a lawyer must, should, or may do after his client has given testimony that the lawyer does not believe. The answer to such questions may well be colored by the particular circumstances attending the actual event and its aftermath.

Because JUSTICE BLACKMUN has preserved such questions for another day, and because I do not understand him to imply any adverse criticism of this lawyer's representation of his client, I join his opinion concurring in the judgment.

NATIONAL LABOR RELATIONS BOARD *v.* FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL 1182, CHARTERED BY UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL–CIO, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84–1493. Argued December 4, 1985—Decided February 26, 1986*

In 1970, the National Labor Relations Board (Board) certified the Firstbank Independent Employees Association (Firstbank) as the collective-bargaining representative of a bargaining unit consisting of the employees of Seattle-First National Bank (SeaFirst), and successive collective-bargaining agreements were negotiated. In 1978, in an election in which only union members were allowed to vote, Firstbank voted to affiliate with an international union and changed its name to the Financial Institution Employees of America, Local 1182 (FIEA). FIEA then petitioned the Board to amend its certification to reflect this change. After initially granting the petition and holding that SeaFirst had committed an unfair labor practice by refusing to recognize the amended certification or to bargain with FIEA, the Board, on reconsideration, held that, because nonunion employees were not allowed to vote in the affiliation election, the election did not meet minimal "due process" standards and that therefore the affiliation was invalid. Accordingly, the Board dismissed FIEA's unfair labor practice charge and vacated the amended certification. The Court of Appeals granted FIEA's petition for review of the Board's decision and remanded the case, holding that the Board's requirement that nonunion employees be allowed to vote on affiliation questions was irrational and inconsistent with the National Labor Relations Act (Act).

Held: The Board exceeded its authority under the Act in requiring that nonunion employees be allowed to vote for affiliation before it would order the employer to bargain with the affiliated union. Pp. 198–209.

(a) Such requirement dramatically changes the scheme under which the Board's practice has been to grant an independent union's petition to

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*Together with No. 84–1509, *Seattle-First National Bank* v. *Financial Institution Employees of America, Local 1182, Chartered by United Food* amend the union's certification to reflect a name change resulting from affiliation with a national or international union if the Board found that union members had an adequate opportunity to vote on affiliation and that there was substantial "continuity" between the preaffiliation and postaffiliation union. Pp. 198–201.

(b) Under the Act, the certified union must be recognized as the exclusive bargaining representative of all employees in the bargaining unit, and the Board cannot discontinue that recognition without determining that the affiliation of that union with another union raises a question of representation and, if so, conducting an election to decide whether the certified union is still the choice of a majority of the unit. Here, by refusing either to amend FIEA's certification or to order SeaFirst to bargain, the Board effectively circumvented the decertification procedures provided for by the Act. Moreover, the Board's requirement that nonunion employees be allowed to vote in the affiliation election violated the policy Congress incorporated into the Act against outside interference in union decisionmaking. Pp. 201–204.

(c) Employees' dissatisfaction with representation is not a reason for requiring the union to allow nonunion employees to vote on union matters like affiliation. Rather, the Act allows union members to control the shape and direction of the union. Dissatisfaction with the decision union members make may be tested by a Board-conducted representation election only if it is unclear whether the recognized union retains majority support. Any distinction between affiliation and other changes in a union's organization and structure does not justify the Board's meddling in the union's internal affairs. Pp. 205–208.

(d) The Board's new rule contravenes the Act's assumption that stable bargaining relationships are best maintained by allowing an affiliated union to continue representing a bargaining unit unless the Board finds that the affiliation raises a question of representation. Such rule effectively gives the employer the power to veto an independent union's decision to affiliate, thereby allowing the employer to interfere directly with union decisionmaking that Congress intended to insulate from outside interference. Pp. 208–209.

752 F. 2d 356, affirmed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ.,

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& Commercial Workers International Union, AFL–CIO, et al., also on certiorari to the same court.

joined. BURGER, C. J., filed an opinion concurring in the judgment, *post*, p. 210.

Norton J. Come argued the cause for petitioner in No. 84–1493. With him on the briefs were *Solicitor General Fried*, *Linda Sher*, and *Patrick J. Szymanski*.

Mark A. Hutcheson argued the cause for petitioner in No. 84–1509. With him on the briefs was *Stephen M. Rummage*.

Laurence Gold argued the cause for respondents in both cases. With him on the brief were *George Murphy*, *Marsha S. Berzon*, *Michael Rubin*, and *David Silberman*.†

JUSTICE BRENNAN delivered the opinion of the Court.

The question for decision in these cases is whether a rule of the National Labor Relations Board that requires that nonunion employees be permitted to vote in a certified union's decision whether to affiliate with another union is consistent with the National Labor Relations Act.

I

In 1970, the Board certified the Firstbank Independent Employees Association (Firstbank) as the collective-bargaining representative of a bargaining unit consisting of the employees of petitioner Seattle-First National Bank (SeaFirst). Firstbank and SeaFirst subsequently negotiated successive collective-bargaining agreements, the most recent of which expired in 1977. In 1978, Firstbank voted to affiliate with the Retail Clerks International Union, AFL–CIO. Under Firstbank's constitution, only union members in good standing could vote in the election. The union members voted in favor of affiliation by a margin of 1,206–774. Upon affiliation, Firstbank changed its name to the Financial Institution Employees of America, Local 1182 (FIEA), chartered by the Retail Clerks International Union, AFL–CIO. FIEA then petitioned the Board to amend its certification to reflect this change. SeaFirst challenged the petition, arguing that affiliation with the Retail Clerks had substantially changed the union, that nonunion employees should have been allowed to vote on whether to affiliate, and that the union had not followed its own constitution in establishing voter eligibility standards. The Board rejected these arguments and amended Firstbank's certification to name FIEA as the employees' bargaining representative. *Seattle-First National Bank*, 241 N. L. R. B. 751 (1979).[1]

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†Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States by *Edward B. Miller* and *Stephen A. Bokat;* for the National Right to Work Legal Defense Foundation by *Raymond J. LaJeunesse, Jr.;* and for the Legal Foundation of America by *Jean Fleming Powers* and *David Crump*.

SeaFirst refused to recognize the amended certification or to bargain with FIEA. The Board sustained FIEA's charges and held that SeaFirst had committed an unfair labor practice in violation of §§8(a)(1) and 8(a)(5) of the Act, 29 U. S. C. §§158(a)(1) and 158(a)(5), and ordered it to bargain.[2] *Seattle-First National Bank*, 245 N. L. R. B. 700 (1979). SeaFirst petitioned the Court of Appeals for the Ninth Circuit for review of the Board's order, and the Board cross-applied for enforcement. Before the Court of Appeals rendered its decision, the Board moved for remand of the case to it, and the court granted the motion. *Seattle-First National Bank* v. *NLRB*, Nos. 79–7515, 80–7004 (June 27, 1980); see n. 4, *infra.*

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[1] After the Board amended FIEA's certification, the Retail Clerks International Union merged with the Amalgamated Meat Cutters and Butcher Workmen of North America to become the United Food and Commercial Workers International Union, AFL–CIO. The Board granted FIEA's motion to amend the name of the charging party in this case to reflect this change. *Seattle-First National Bank*, 245 N. L. R. B. 700, 700, n. 1 (1979).

[2] Under § 8(a) of the Act, as set forth in 29 U. S. C. § 158(a), "[i]t shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

. . . . .

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

On remand, the Board notified the parties of its decision on its own motion to reconsider its earlier decision. On reconsideration, the Board held that, because nonunion employees were not allowed to vote in the affiliation election, the election did not meet minimal "due process" standards, and therefore that the affiliation was invalid. Accordingly, the Board dismissed FIEA's unfair labor practice charge and vacated the amended certification. *Seattle-First National Bank*, 265 N. L. R. B. 426 (1982).

FIEA petitioned the Court of Appeals for the Ninth Circuit for review of the Board's decision. The Court of Appeals, in a 2–1 decision, granted the petition and remanded the case. 752 F. 2d 356 (1984). The court held that the Board's requirement that nonunion employees be allowed to vote on affiliation questions was irrational and inconsistent with the Act for three reasons. First, the Board's rule intruded upon the union's internal affairs—here a totally unjustified intrusion because the Board had not determined that affiliation had substantially changed the union or eroded its majority support—and violated the "longstanding federal labor policy of avoiding unnecessary interference in internal union affairs." *Id.*, at 362. Second, the Board's rule was "inconsistent with the strong national policy of maintaining stability in the bargaining representative." *Id.*, at 364. Pursuant to that policy, Congress and the Board had restricted the opportunities for employers and employees to challenge a certified union's status as bargaining representative,[3] and the Board's new rule did not further but breached the policy, since it effectively decertified the union without a Board determination that affiliation had undermined the union's majority support. Finally, the Board's rule was irrational, because the interests of nonunion employees were adequately protected under existing procedures, and because the Board's reasoning did not support the rule.

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[3] The court cited three examples of Board rules designed to maintain stable bargaining relationships. 752 F. 2d, at 365. First, in cases in which the employer is charged with refusing to bargain with a certified union, the union enjoys a presumption of majority status. For the first

The holding of the Court of Appeals conflicts with contrary holdings of the Courts of Appeals for the Fifth and Seventh Circuits upholding the Board's rule. *Local Union No. 4–14* v. *NLRB*, 721 F. 2d 150, 152–153 (CA5 1983); *United Retail Workers Union, Local 881* v. *NLRB*, 774 F. 2d 752 (CA7 1985).[4] We granted both petitions in this case to to resolve the conflict. 471 U. S. 1098 (1985). We affirm.

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year after certification, this presumption is irrebuttable. See *Brooks* v. *NLRB*, 348 U. S. 96, 103 (1954). Second, the Board will consider "decertifying" a union only if at least 30% of the employees present a petition, or in "extreme cases." See 29 CFR § 101.18 (1985); R. Gorman, Basic Text on Labor Law 49–50 (1976). Third, under its contract-bar rule, the Board ordinarily refuses to conduct decertification elections for a certain period of time while the collective-bargaining agreement remains in effect. See 1 C. Morris, The Developing Labor Law 361–376 (2d ed. 1983).

[4] The procedural history of the Fifth Circuit's decision is closely intertwined with this case. In that case, the employer refused to bargain with an affiliated union because only union members had been allowed to vote on affiliation. The Board ordered the employer to bargain. *Amoco Production Co.*, 220 N. L. R. B. 861 (1975), aff'd, 239 N. L. R. B. 1195 (1979). The Board relied on its *Amoco* decision when it originally amended FIEA's certification in this case. *Amoco* was then appealed to the Court of Appeals for the Fifth Circuit, which remanded the case for the Board to determine whether affiliation had substantially changed the union. *Amoco Production Co.* v. *NLRB*, 613 F. 2d 107, 112 (1980). In light of the strong similarity between the two cases, the Board asked the Ninth Circuit to remand this case as well. On remand from the Fifth Circuit, the Board did not address whether affiliation had substantially changed the union. Rather, the Board reversed itself and concluded that the affiliation was invalid because only union members had been allowed to vote. *Amoco Production Co.*, 262 N. L. R. B. 1240 (1982). The Board in turn relied on this decision in dismissing FIEA's unfair labor practice charge and revoking its amended certification.

II

Section 7 of the Act guarantees employees the right "to bargain collectively through representatives of their own choosing," 29 U. S. C. § 157, and the Board is empowered to determine representation on petition of employees or the employer. 29 U. S. C. §§ 159(c)(1)(A)(i), 159(c)(1)(B). In either case, the Board investigates the petition and holds a hearing if it has reasonable cause to believe that a "question of representation" exists, 29 U. S. C. § 159(c), and directs a representation election by secret ballot to settle the question. *Ibid.* The Board certifies the winning union as the bargaining representative of all of the employees in the bargaining unit. The employer commits an unfair labor practice by refusing to bargain with the employees' certified bargaining representative. 29 U. S. C. § 158(a)(5).

The Act recognizes that employee support for a certified bargaining representative may be eroded by changed circumstances. In such cases, employees may petition the Board for another election, alleging that the certified representative no longer enjoys majority support. 29 U. S. C. § 159(c)(1)(A)(ii); 29 CFR §§ 101.17, 102.60(a) (1985). Similarly, an employer who questions whether a majority of employees continue to support a certified union may petition for another election. 29 U. S. C. § 159(c)(1)(B); 29 CFR §§ 101.17, 102.60(a) (1985); see 1 C. Morris, The Developing Labor Law 349 (2d ed. 1983). The employer, however, must "demonstrate by objective considerations that it has some reasonable grounds for believing that the union has lost its majority status." *United States Gypsum Co.*, 157 N. L. R. B. 652, 656 (1966); 29 CFR § 101.17 (1985); see 1 Morris, *supra.* Again, if the Board determines, after investigation and hearing, that a question of representation exists, it directs an election by secret ballot and certifies the result. 29 U. S. C. § 159(c).

One such change in circumstances is, as here, where an independent union decides to affiliate with a national or international organization.[5] In many such cases, the union may also change its name to reflect its new affiliation, and will petition the Board to amend its certification to reflect this name change. 29 CFR §§ 101.17, 102.60(b) (1985). The Board's practice has been to grant such petitions if the Board found that the affiliation satisfied two conditions. First, that union members have had an adequate opportunity to vote on affiliation. *North Electric Co.*, 165 N. L. R. B. 942, 943 (1967). The Board ordinarily required that the affiliation election be conducted with adequate "due process" safeguards, including notice of the election to all members, an adequate opportunity for members to discuss the election, and reasonable precautions to maintain ballot secrecy. *E. g., Newspapers Inc.*, 210 N. L. R. B. 8, 9 (1974), enf'd, 515 F. 2d 334 (CA5 1975).[6] Second, that there was substantial "continuity" between the pre- and post-affiliation union. The focus of this inquiry was whether the affiliation had substantially changed the union; the Board considered such factors as whether the union retained local autonomy and local officers, and continued to follow established procedures.

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[5] A local union may seek to affiliate with a larger organization for a variety of reasons. The larger organization may provide bargaining expertise or financial support, or may compensate for a lack of leadership within the local union. *Amoco Production Co.*, 239 N. L. R. B., at 1195; Hale, Union Affiliations: Examination of Governing NLRA Standards, 1983 Det. C. L. Rev. 709. Affiliation "is but one of many ways in which labor organizations alter their structures and alignments in response to changing economic and political conditions." Note, Union Affiliations and Collective Bargaining, 128 U. Pa. L. Rev. 430, 431 (1979). The Board has recognized that a union "must remain largely unfettered in its organizational quest for financial stability and aid in the negotiating process." *The Williamson Co.*, 244 N. L. R. B. 953, 955 (1979).

[6] The union suggests that it may even be inappropriate for the Board to impose due process safeguards with respect to union members. Brief for FIEA 28–29. While we note that the NLRA does not require unions to follow specified procedures in deciding matters such as affiliations, we need not assess the propriety of the Board's past procedures.

See Note, *supra* n. 5, at 445, and nn. 74–82.[7] If the organizational changes accompanying affiliation were substantial enough to create a different entity, the affiliation raised a "question concerning representation" which could only be resolved through the Board's election procedure. 1 Morris, *supra*, at 690; 29 CFR §§ 101.17, 102.60(b) (1985). However, as long as continuity of representation and due process were satisfied, affiliation was considered an internal matter that did not affect the union's status as the employees' bargaining representative, and the employer was obligated to continue bargaining with the reorganized union. 1 Morris, *supra*, at 690–691; *Universal Tool & Stamping Co.*, 182 N. L. R. B. 254, 259 (1970).[8]

The Board's new rule dramatically changes this scheme.[9] The Board now takes the position that all employees in the bargaining unit—not merely union members—must have the opportunity to participate in the affiliation decision. See *Amoco Production Co.*, 262 N. L. R. B. 1240, 1241 (1982). Unless they are allowed to do so, the Board will not amend the union's certification or require the employer to bargain with the reorganized union. The Board applies this rule even though the organizational changes resulting from the affiliation are not substantial enough to raise a question of representation. See Brief for NLRB 16–17. The Board does not contend that the Act requires that all employees of the bargaining unit, union and nonunion, must be allowed to participate in the affiliation election or that the Act expressly authorizes the Board to impose such requirements. Rather, the Board and the employer defend the Board's new rule on two grounds. First, they assert that the Board's rule is a reasonable means of protecting the bargaining unit employees' right to select a bargaining representative under § 7 of the Act. Second, they argue that the rule minimizes industrial strife. We address each argument in turn.

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[7] The parties disagree over whether affiliation substantially changed the union in this case. See Brief for NLRB 4, and n. 2; Brief for FIEA 4. However, the Board did not make a continuity determination but simply dismissed FIEA's unfair labor practice charge and vacated its amended certification. The Court of Appeals therefore declined to address the continuity issue. 752 F. 2d, 356, 359, n. 4 (1984). We also decline to address it.

[8] In some cases, the affiliated union will not petition the Board to amend its certification, but will instead wait to see whether the employer will continue to bargain. If the employer refuses to bargain, the union may then file an unfair labor practice charge with the Board. In the past, the Board required the employer to bargain if the affiliation satisfied its two-pronged due process and continuity test. In other words, the Board used the same standards to examine affiliations whether the issue arose as a defense to an unfair labor practice charge or in a petition to amend a certification. *Independent Drug Store Owners of Santa Clara County*, 211 N. L. R. B. 701, n. 2 (1974), enf'd, 528 F. 2d 1225 (CA9 1975); Hale, *supra* n. 5, at 710, and n. 8; Note, *supra* n. 5, at 432.

[9] The Board's assertion that it actually adopted its "new" rule in its decision in *Jasper Seating Co.*, 231 N. L. R. B. 1025 (1977), may be questioned. *Jasper* was a 3–2 decision in which only two members took the position that nonunion employees should be allowed to vote in affiliation elections. While suggesting that he could adopt this position under other circumstances, member Penello concurred in the decision "based upon the

III

A

Petitioners argue that the Board should be afforded "a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees," *NLRB* v. *A. J. Tower Co.*, 329 U. S. 324, 330 (1946); see also 29 U. S. C. § 156; *NLRB* v. *Wyman-Gordon Co.*, 394 U. S. 759, 767 (1969); *NLRB* v. *Waterman S.S. Corp.* 309 U. S. 206, 226 (1940), and contend that a requirement that all employees be allowed to vote on affiliation is a reasonable means of insuring that a majority of employees consent to representation by the postaffiliation union, and ultimately of protecting the right of

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application of [different] principles." *Id.*, at 1026. He found that the affiliation had raised a question of representation which could only be resolved through a Board-conducted representation election. *Id.*, at 1027.

all employees to select a bargaining representative. Our cases have previously recognized the Board's broad authority to construe provisions of the Act, and have deferred to Board decisions that are not irrational or inconsistent with the Act. *Ford Motor Co.* v. *NLRB*, 441 U. S. 488, 495, 497 (1979); *Beth Israel Hospital* v. *NLRB*, 437 U. S. 483, 501 (1978); *NLRB* v. *Iron Workers*, 434 U. S. 335, 350 (1978). However, the question here is whether the Board's new rule exceeds the Board's statutory authority. Cf. *NLRB* v. *Longshoremen*, 473 U. S. 61 (1985); *NLRB* v. *Bildisco & Bildisco*, 465 U. S. 513 (1984). Deference to the Board "cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption . . . of major policy decisions properly made by Congress." *American Ship Building Co.* v. *NLRB*, 380 U. S. 300, 318 (1965); see also *NLRB* v. *Insurance Agents*, 361 U. S. 477, 499 (1960). We hold that the Board's new rule exceeds its authority under the Act.

Under the Act, the certified union must be recognized as the exclusive bargaining representative of all employees in the bargaining unit, and the Board cannot discontinue that recognition without determining that the affiliation raises a question of representation and, if so, conducting an election to decide whether the certified union still is the choice of a majority of the unit. 29 U. S. C. § 159(c). Of course, as is the case with any organizational and structural change, a new affiliation may substantially change a certified union's relationship with the employees it represents. These changed circumstances may in turn raise a "question of representation," if it is unclear whether a majority of employees continue to support the reorganized union. Thus, in these situations, the affiliation implicates the employees' right to select a bargaining representative, and to protect the employees' interests, the situation may require that the Board exercise its authority to conduct a representation election. 29 U. S. C. § 159(c)(1). However, the Board's decision must take into account that "[t]he industrial stability sought by the

Act would unnecessarily be disrupted if every union organizational adjustment were to result in displacement of the employer-bargaining representative relationship." *Canton Sign Co.*, 174 N. L. R. B. 906, 909 (1969), enf. denied on other grounds, 457 F. 2d 832 (CA6 1972). In many cases, a majority of employees will continue to support the union despite any changes precipitated by affiliation.[10] In such situations, affiliation does not necessarily implicate the "selection" of a new bargaining representative. The reorganized union may legitimately claim to succeed as the employees' duly selected bargaining representative, and in that case retains a legitimate interest in continuing to bargain collectively with the employer. The Act balances these competing concerns by authorizing the Board to conduct a representation election *only* where affiliation raises a question of representation. 29 U. S. C. § 159(c). Conversely, where affiliation does not raise a question of representation, the statute gives the Board no authority to act. The Board's new rule upsets the accommodation drawn by the statute by effectively decertifying the reorganized union even where affiliation does not raise a question of representation.

Turning to the record in these cases, the Board revoked FIEA's certification and relieved SeaFirst of its obligation to bargain despite the fact, as the Board acknowledges, that it was not sufficient to raise a question of representation that nonunion employees were not allowed to vote in the affiliation election. Brief for NLRB 16–17. Absent a question of representation, FIEA continued to function, as it was entitled to do, as the bargaining representative of the unit, and SeaFirst was obligated to continue bargaining with it. By refusing either to amend FIEA's certification or to order SeaFirst to bargain, the Board effectively circumvented the decertification procedures provided for by statute. Moreover, the Board exceeded its statutory authority by requiring that nonunion employees be allowed to vote in the union's affiliation election. This violated the policy Congress incorporated into the Act against outside interference in union decisionmaking. See *Steelworkers* v. *Sadlowski*, 457 U. S. 102, 117 (1982); *NLRB* v. *Boeing Co.*, 412 U. S. 67, 71 (1973); *Scofield* v. *NLRB*, 394 U. S. 423, 428 (1969); *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175, 195 (1967). Petitioners maintain that this policy must give way to the right of the employees to select a bargaining representative. Cf. *Pattern Makers* v. *NLRB*, 473 U. S. 95 (1985) (union rule barring resignations during a strike contrary to statutory policy of voluntary unionism); *NLRB* v. *Marine Workers*, 391 U. S. 418 (1968) (union rule requiring exhaustion of internal grievance procedures does not preclude Board review). But the Act establishes a specific election procedure to decide whether the employees desire a change in a certified union's representative status. While the Board is charged with responsibility to administer this procedure, the Act gives the Board no authority to require unions to follow other procedures in adopting organizational changes.[11]

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[10] The Board has recognized that "affiliation does not directly involve the employment relation. The status of wages, working conditions, benefits, and grievance procedures is unaffected by the affiliation vote; the collective-bargaining agreement between the union and the employer remains effective until the stated expiration date." *Amoco Production Co.*, 239 N. L. R. B., at 1195. Affiliation "has no probative value concerning the employees' choice of the [union] as their collective bargaining representative." *American Range Lines, Inc.*, 13 N. L. R. B. 139, 154 (1939); see also Brief for NLRB 16, n. 10 ("The Board has in general found that affiliations do not destroy continuity of representation").

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[11] Congress has expressly declined to prescribe procedures for union decisionmaking in matters such as affiliation. When the NLRA was amended by the Labor Management Relations Act of 1947, the House passed a proposal that would have regulated union procedures for electing officers, assessing dues, disciplining members, and deciding to strike. H. R. 3020, § 8(c), 80th Cong., 1st Sess. (1947), 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, pp. 179–183 (Legis. Hist.). These provisions were deleted from the final legislation. See 93 Cong. Rec. 6443 (1947), 2 Legis. Hist. 1540 ("The Senate conferees . . . felt that it was unwise to authorize [the NLRB] to undertake such elaborate

B

Petitioners contend that this statutory scheme does not adequately protect the interests of nonunion employees, and that this justifies the Board's new rule. They argue that an affiliation may affect a union's representation of the bargaining unit even if it does not raise a question of representation, but that argument overlooks the fact that a union makes many decisions that "affect" its representation of nonmember employees. It may decide to call a strike, ratify a collective-bargaining agreement, or select union officers and bargaining representatives. Under the Act, dissatisfied employees may petition the Board to hold a representation election, but the Board has no authority to conduct an election unless the effects complained of raise a question of representation. In any event, dissatisfaction with representation is not a reason for requiring the union to allow nonunion employees to vote on union matters like affiliation. Rather, the Act allows union members to control the shape and direction of their organization, and "[n]on-union employees have no voice in the affairs of the union." *Allis-Chalmers*, 388 U. S., at 191. We repeat, dissatisfaction with the decisions union members make may be tested by a Board-conducted representation

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policing of the internal affairs of unions"). In 1959, Congress adopted the Labor-Management Reporting and Disclosure Act, which regulated union procedures for assessing dues, disciplining employees, and electing officers. 29 U. S. C. §§ 411–415, 481. Senators Knowland and McClellan both advanced proposals to regulate other sorts of union decisions. See 104 Cong. Rec. 11184 (1958) (constitutional amendments and recall of officers); *id.*, at 11461 (waiver of right to strike); S. 1137, § 102(5), 86th Cong., 1st Sess. (1959), 1 Legislative History of the Labor-Management Reporting and Disclosure Act 272–273 (1959) (creation of affiliated organizations or funds), § 103(4), *id.*, at 277 (mergers and transfers between local unions). None of these proposals was incorporated into the statute. See *Steelworkers* v. *Sadlowski*, 457 U. S. 102, 117 (1982) ("Congress was guided by the general principle that unions should be left free to 'operate their own affairs, as far as possible.' It believed that only essential standards should be imposed by legislation" (citation omitted)).

election only if it is unclear whether the reorganized union retains majority support.

Petitioners concede that a union's organizational and structural changes would not ordinarily justify the Board's meddling in a union's internal affairs, but argue that affiliation is different from other changes because affiliation necessarily changes the union's identity, and because initiation of the change is by the certified union seeking the Board's approval for the affiliation by amendment of its certification or an order on the employer to bargain after affiliation. Neither distinction is persuasive.

First, petitioners argue that affiliation differs from other organizational changes because it results in employees being represented by a different organization. See *Hamilton Tool Co.*, 190 N. L. R. B. 571, 576 (1971) (Miller, concurring). But many organizational or structural changes may operate to alter a union's "identity." This would be the case where the union amends its constitution or bylaws, restructures its financial obligations and resources, or alters its jurisdiction. The fact that an affiliation is often accompanied by a formal name change does not serve to distinguish it from other organizational developments. As the Board has recognized, "an affiliation does not create a new organization, nor does it result in the dissolution of an already existing organization." *Amoco Production Co.*, 239 N. L. R. B. 1195 (1979). Rather, the union will determine "whether any administrative or organizational changes are necessary in the affiliating organization." *Ibid.* If these changes are sufficiently dramatic to alter the union's identity, affiliation may raise a question of representation, and the Board may then conduct a representation election. Otherwise, the statute gives the Board no authority to interfere in the union's affairs.

Petitioners next contend that affiliation involves the union's asking the Board to amend its certification or to order the employer to bargain.[12] Petitioners assert that the Board therefore has a strong interest in insuring that its own election procedures have not been circumvented before placing its imprimatur on the union's affiliation election. This argument mischaracterizes the nature of the relevant procedures. In amending the union's certification or ordering the employer to bargain, the Board does not "sanction" the union's affiliation. Rather, it signifies only that the reorganized union continues as an ongoing entity that the employer should continue to recognize. By analogy, the fact that the Board may order the employer to bargain with a union that has amended its constitution does not mean that the Board has "sanctioned" the constitutional amendment. In any event, the Board's interest in insuring the integrity of its procedures does not empower it to adopt measures exceeding its statutory authority. If the Board finds that affiliation raises a question of representation "undermining . . . the Board's own election and certification procedures," *Amoco Production Co.*, 262 N. L. R. B., at 1241, it can refuse to consider the union's unfair labor practice charge, and is authorized to conduct a representation election. However, it may not condone an employer's refusal to bargain in the absence of a question of representation, and has no authority to prescribe internal procedures for the union to follow in order to invoke the Act's protections.

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[12] In its *amicus* brief, the Chamber of Commerce notes that the statute does not explicitly provide for petitions to amend a union's certification, and argues that the Board therefore has broad authority to refuse to grant such requests. However, because the union's request to amend its certification is a mere formality, it cannot give the Board additional authority to police the affiliation. A union could simply decide not to change its name upon affiliation, and would not have to ask the Board to amend its certification. The employer might then challenge the affiliation as a defense to an unfair labor practice charge. Unless the Board finds that the affiliation raised a question of representation, the affiliated union would continue as the employees' bargaining representative, and the employer would be required to bargain with the reorganized union. Thus, the amended certification procedure cannot broaden the Board's authority to interfere in the union's affairs.

IV

The basic purpose of the National Labor Relations Act is to preserve industrial peace. 29 U. S. C. § 151. The Act includes several provisions designed to encourage stable bargaining relationships, *e. g.*, § 8(b)(7)(A), 29 U. S. C. § 158 (b)(7)(A) (prohibiting recognitional picketing by employees represented by recognized union); § 8(b)(7)(B), 29 U. S. C. § 158(b)(7)(B) (prohibiting recognitional picketing for one year after election); § 9(c)(3), 29 U. S. C. § 159(c)(3) (prohibiting second representation election within one year), and the Board has devised rules to achieve the same ends. See n. 3, *supra*. Petitioners argue that the Board's new rule furthers this policy by introducing a measure of certainty into the bargaining relationship that protects both the employer and the union. By having all employees vote for affiliation, so the argument goes, the employer avoids the possibility of having to bargain with a union that may not represent a majority of the employees. Petitioners submit that the union also benefits from having all employees vote, since it avoids the disruption that would occur if the Board eventually determines that it must hold a new election because the affiliation raises a question of representation. If the employees vote for affiliation, the union can continue to bargain with confidence, since the employer is less likely to challenge the affiliation, and the Board is less likely to find a question of representation. If the employees vote against affiliation, the incumbent union can forgo affiliation and continue to represent the bargaining unit.

Absent any statutory framework, the Board's rule might well be a rational means of preserving industrial stability. However, as the Ninth Circuit noted, Congress has already determined "as a matter of national labor policy that bargaining stability and the principle of majority rule may limit the timing of employee challenges to their certified bargaining representative's majority status." 752 F. 2d, at 366. The Act assumes that stable bargaining relationships are best maintained by allowing an affiliated union to continue representing a bargaining unit unless the Board finds that the affiliation raises a question of representation. The Board's rule contravenes this assumption, since an employer may invoke a perceived procedural defect to cease bargaining even though the union succeeds the organization the employees chose, the employees have made no effort to decertify the union, and the employer presents no evidence to challenge the union's majority status. Any uncertainty on the employer's part does not relieve him of his obligation to bargain collectively. "If an employer has doubts about his duty to continue bargaining, it is his responsibility to petition the Board for relief . . . . To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to [industrial peace]." *Brooks* v. *NLRB*, 348 U. S. 96, 103 (1954). The Board's rule effectively gives the employer the power to veto an independent union's decision to affiliate, thereby allowing the employer to directly interfere with union decisionmaking Congress intended to insulate from outside interference.

We hold that the Board exceeded its authority under the Act in requiring that nonunion employees be allowed to vote for affiliation before it would order the employer to bargain with the affiliated union.[13] The judgment of the Court of Appeals is affirmed. The cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

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[13] We do not suggest, however, that other Board representation procedures, such as its continuity determination, exceed its statutory authority.

Respondents argue that the Board's rule is irrational because it assumes that affiliation involves the selection of a new bargaining representative absent any indication that the affiliation has significantly changed the union. Because we conclude that the Board has exceeded its authority under the statute, we need not address this issue.

CHIEF JUSTICE BURGER, concurring in the judgment.

I write separately to note that the Court's action today striking down a Board action is one of those rare departures from this Court's long history of special deference to the Board's decisions concerning the selection of an exclusive bargaining unit representative by employees. See, *e. g.*, *NLRB* v. *A. J. Tower Co.*, 329 U. S. 324, 330 (1946); see also *NLRB* v. *Action Automotive, Inc.*, 469 U. S. 490 (1985).

CONNOLLY ET AL., TRUSTEES OF THE OPERATING ENGINEERS PENSION TRUST *v.* PENSION BENEFIT GUARANTY CORPORATION ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 84-1555. Argued December 2, 1985—Decided February 26, 1986*

The Employee Retirement Income Security Act (ERISA), enacted in 1974, established a pension plan termination insurance program whereby the Pension Benefit Guaranty Corporation (PBGC), a wholly owned Government corporation, collects insurance premiums from covered private retirement plans and provides benefits to participants if their plan terminates with insufficient assets to support the guaranteed benefits. The program covers both single-employer and multiemployer pension plans. With respect to the latter plans, ERISA delayed mandatory payment of guaranteed benefits until January 1, 1978, prior to which date the PBGC had discretionary authority to pay benefits upon the termination of a pension plan. As that date approached, Congress became concerned that a significant number of multiemployer plans were experiencing extreme financial hardship, and that implementation of mandatory guarantees might induce several large plans to terminate, thus subjecting the insurance system to liability beyond its means. After further delaying the effective date for the mandatory guarantees, Congress enacted the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) requiring an employer withdrawing from a multiemployer pension plan to pay a fixed and certain debt to the plan amounting to the employer's proportionate share of the plan's "unfunded vested benefits." Appellant trustees administer a multiemployer pension plan for employers under collective-bargaining agreements covering employees in the construction industry in California and Nevada. Under the trust agreement and the plan, the employer's sole obligation is to pay the contributions required by the collective-bargaining agreements, and the employer's obligation for pension benefits is ended when the employer pays the contribution to the pension trust. Prior to enactment of the MPPAA, the trustees filed suit against the PBGC in Federal District Court, claiming, *inter alia*, that ERISA was unconstitutional as depriving the trustees, the employers, and the plan participants of property

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*Together with No. 84-1567, *Woodward Sand Co., Inc.* v. *Pension Benefit Guaranty Corporation et al.*, also on appeal from the same court.

without proper compensation. During the course of the litigation, the MPPAA was enacted, and the District Court permitted the trustees to file an amended complaint to include a challenge to that Act. Ultimately, the District Court granted summary judgment in the PBGC's favor, rejecting appellants' argument that imposition of withdrawal liability under the MPPAA violates the Taking Clause of the Fifth Amendment.

Held: The withdrawal liability provisions of the MPPAA do not violate the Taking Clause. Pp. 221–228.

(a) In these cases, the United States under the MPPAA has taken nothing for its own use and only has nullified a contractual provision limiting liability by imposing an additional obligation that is otherwise within Congress' power to impose. That the statutory withdrawal liability will operate in this manner and will redound to the benefit of the pension trust does not justify a holding that the withdrawal liability provisions violate the Taking Clause. Pp. 221–224.

(b) In identifying a "taking" forbidden by the Taking Clause, three factors should be considered: (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 124. Examining the MPPAA in light of these factors supports the conclusion that the imposition of withdrawal liability does not constitute a compensable taking under the Taking Clause. The interference with an employer's property rights resulting from requiring the employer to fund its share of the pension plan obligation arises from a public program that adjusts the benefits and burdens of economic life to promote the common good and does not constitute a taking requiring Government compensation. As to the severity of the MPPAA's economic impact, there is nothing to show that the withdrawal liability imposed on an employer will always be out of proportion to its experience with the pension plan. And as to interference with reasonable investment-backed expectations, employers had more than sufficient notice not only that pension plans were being regulated at the time the MPPAA was enacted but also that withdrawal itself might trigger additional financial obligations. Pp. 224–228.

631 F. Supp. 640, affirmed.

WHITE, J., delivered the opinion for a unanimous Court. O'CONNOR, J., filed a concurring opinion, in which POWELL, J., joined, *post*, p. 228.

Wayne Jett argued the cause and filed briefs for appellants in No. 84–1555. *Richard M. Freeman* argued the cause for appellant in No. 84–1567. With him on the brief was *Michael L. Jensen.*

Baruch A. Fellner argued the cause for appellees. With him on the brief were *Edward R. Mackiewicz, Mitchell L. Strickler, J. Stephen Caflisch, Peter H. Gould, David F. Power, Nathan Lewin,* and *Seth P. Waxman.*†

JUSTICE WHITE delivered the opinion of the Court.

In *Pension Benefit Guaranty Corporation* v. *R. A. Gray & Co.,* 467 U. S. 717 (1984), the Court held that retroactive application of the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980 did not violate the Due Process Clause of the Fifth Amendment. In these cases, we address the question whether the withdrawal liability provisions of the Act are valid under the Clause of the Fifth Amendment that forbids the taking of private property for public use without just compensation.

I

A

The background and legislative history of both the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, 29 U. S. C. § 1001 *et seq.,* and the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA or Act), 94 Stat. 1208, 29 U. S. C. §§ 1381–1461, are set forth in detail in *Gray, supra,* at 720–725. We therefore only summarize the relevant portions of that description for purposes of our discussion here.

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†Briefs of *amici curiae* urging reversal were filed for the American Trucking Associations, Inc., by *Carl L. Taylor, Glenn Summers, Daniel R. Barney,* and *Kenneth E. Siegel;* and for the National Association of Manufacturers by *Chester W. Nosal, John R. Keys, Jr., Columbus R. Gangemi, Jan S. Amundson,* and *Gary D. Lipkin.*

Briefs of *amici curiae* urging affirmance were filed for the National Coordinating Committee for Multiemployer Plans by *Gerald M. Feder;* and for Trustees of the United Mine Workers of America 1950 and 1974 Pension Plans by *William F. Hanrahan* and *Israel Goldowitz.*

William H. Towle filed a brief for the American Warehousemen's Association as *amicus curiae.*

Congress enacted ERISA in 1974 to provide comprehensive regulation for private pension plans. In addition to prescribing standards for the funding, management, and benefit provisions of these plans, ERISA also established a system of pension benefit insurance. This "comprehensive and reticulated statute" was designed "to ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans. . . . Congress wanted to guarantee that 'if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he will actually receive it.'" 467 U. S., at 720, quoting *Nachman Corp.* v. *Pension Benefit Guaranty Corporation*, 446 U. S. 359, 361–362, 374–375 (1980) (citations omitted).

To achieve this goal of protecting "anticipated retirement benefits," Congress created the Pension Benefit Guaranty Corporation (PBGC), a wholly owned Government corporation, to administer an insurance program for participants in both single-employer and multiemployer pension plans. 29 U. S. C. § 1302 (1976 ed.). For single-employer plans that were in default, ERISA immediately obligated the PBGC to pay benefits. § 1381. With respect to multiemployer plans, ERISA delayed mandatory payment of guaranteed benefits until January 1, 1978. Until that date, Congress gave the PBGC discretionary authority to pay benefits upon the termination of multiemployer pension plans. §§ 1381(c)(2)–(4). As with single-employer plans, all contributors to covered multiemployer plans were assessed insurance premiums payable to the PBGC. If the PBGC exercised its discretion to pay benefits upon a plan's termination, all employers that had contributed to the plan during the five years preceding its termination were liable to the PBGC in amounts proportional to their shares of the plan's contributions during that period, subject to the limitation that any individual employer's liability could not exceed 30% of the employer's net worth. § 1362(b)(2).

During the period between the enactment of ERISA and 1978, when mandatory multiemployer guarantees were due to go into effect, the PBGC extended coverage to numerous plans. "Congress became concerned that a significant number of plans were experiencing extreme financial hardship," *Gray*, *supra*, at 721, and that implementation of mandatory guarantees for multiemployer plans might induce several large plans to terminate, thus subjecting the insurance system to liability beyond its means. As a result, Congress delayed the effective date for the mandatory guarantees for 18 months, Pub. L. 95–214, 91 Stat. 1501, and directed the PBGC to prepare a report analyzing the problems of multiemployer plans and recommending possible solutions. See S. Rep. No. 95–570, pp. 1–4 (1977); H. R. Rep. No. 95–706, p. 1 (1977).

The PBGC's Report found, *inter alia*, that "ERISA did not adequately protect plans from the adverse consequences that resulted when individual employers terminate their participation in, or withdraw from, multiemployer plans." *Gray*, *supra*, at 722. The "basic problem," the Report found, was the threat to the solvency and stability of multiemployer plans caused by employer withdrawals, which existing law actually encouraged. Pension Benefit Guaranty Corporation, Multiemployer Study Required by P. L. 95–214, pp. 96–97 (1978) (PBGC Report).[1] As the PBGC's Executive Director explained:

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[1] The inadequacy of existing law was demonstrated by the Report's finding that roughly 10% of all multiemployer plans, covering 1.3 million participants, were experiencing financial difficulties. PBGC Report, at 1. Funding of all plan benefits under these plans, if they terminated, would cost the insurance system approximately $4.8 billion and necessitate an increase in premiums to unacceptable levels. *Id.*, at 2, 16, 139. See also

> "A key problem of ongoing multiemployer plans, especially in declining industries, is the problem of employer withdrawal. Employer withdrawals reduce a plan's contribution base. This pushes the contribution rate for remaining employers to higher and higher levels in order to fund past service liabilities, including liabilities generated by employers no longer participating in the plan, so-called inherited liabilities. The rising costs may encourage—or force—further withdrawals, thereby increasing the inherited liabilities to be funded by an ever decreasing contribution base. This vicious downward spiral may continue until it is no longer reasonable or possible for the pension plan to continue." Pension Plan Termination Insurance Issues: Hearings before the Subcommittee on Oversight of the House Committee on Ways and Means, 95th Cong., 2nd Sess., 22 (1978) (statement of Matthew M. Lind) (hereinafter 1978 Hearings).

"To alleviate the problem of employer withdrawals, the PBGC suggested new rules under which a withdrawing employer would be required to pay whatever share of the plan's unfunded liabilities was attributable to that employer's participation." *Gray*, 467 U. S., at 723, citing PBGC Report, at 97–114 (footnote omitted). Again, the PBGC Executive Director explained:

> "To deal with this problem, our report considers an approach under which an employer withdrawing from a multiemployer plan would be required to complete funding its fair share of the plan's unfunded liabilities. In

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Hearings on the Multiemployer Pension Plan Amendments Act of 1979 before the Task Force on Welfare and Pension Plans of the Subcommittee on Labor-Management Relations of the House Committee on Education and Labor, 96th Cong., 1st Sess. 1156, 1170, 1291 (1980). See also Brief for National Coordinating Committee for Multiemployer Plans as *Amicus Curiae* 12–14; Brief of Trustees for United Mine Workers of America 1950 and 1974 Pension Plans as *Amici Curiae* 7.

> other words, the plan would have a claim against the employer for the inherited liabilities which would otherwise fall upon the remaining employers as a result of the withdrawal. . . .
>
> "We think that such withdrawal liability would, first of all, discourage voluntary withdrawals and curtail the current incentives to flee the plan. Where such withdrawals nonetheless occur, we think that withdrawal liability would cushion the financial impact on the plan." 1978 Hearings, at 23 (statement of Matthew M. Lind).

After 17 months of discussion, Congress agreed with the analysis put forward in the PBGC Report, and drafted legislation which implemented the Report's recommendations. "As enacted, the Act requires that an employer withdrawing from a multiemployer pension plan pay a fixed and certain debt to the pension plan. This withdrawal liability is the employer's proportionate share of the plan's 'unfunded vested benefits,' calculated as the difference between the present value of the vested benefits and the current value of the plan's assets." *Gray*, *supra*, at 725, quoting 29 U. S. C. §§1381, 1391.

B

Appellant Trustees administer the Operating Engineers Pension Plan according to a written Agreement Establishing the Operating Engineers Pension Trust, executed in 1960, pursuant to §302(c)(5) of the Labor Management Relations Act, 1947, 29 U. S. C. §186(c)(5). App. 29. The Trust receives contributions from several thousand employers under written collective-bargaining agreements covering employees in the construction industry throughout southern California and southern Nevada. Under these collective-bargaining agreements, the employers agree to contribute a certain amount to the Pension Plan, with the actual amount contributed by each employer determined by multiplying their employees' hours of service by a rate specified in the current agreement. See *id.*, at 33–35.

By the express terms of the Trust Agreement, *id.*, at 30–31, and the Plan, *id.*, at 31–32, the employer's sole obligation to the Pension Trust is to pay the contributions required by the collective-bargaining agreement. The Trust Agreement clearly states that the employer's obligation for pension benefits to the employee is ended when the employer pays the appropriate contribution to the Pension Trust.[2] This is true even though the contributions agreed upon are insufficient to pay the benefits under the Plan.[3]

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[2] Article II, § 7, of the Trust Agreement provides as follows:

"Neither the Employers nor any Signatory Association, or officer, agent, employee or committee member of the Employers or any Signatory Association, shall be liable to make Contributions to the Fund or with respect to the Pension Plan, except to the extent that he or it may be an Individual Employer required to make Contributions to the Fund with respect to his or its own individual or joint venture operations, or to the extent he or it may incur liability as a Trustee as hereinafter provided. Except as provided in Article III hereof, the liability of any Individual Employer to the Fund, or with respect to the Pension Plan, shall be limited to the payments required by the Collective Bargaining Agreements with respect to his or its individual or joint venture operations, and in no event shall he or it be liable or responsible for any portion of the Contributions due from other Individual Employers or with respect to the operations of such Individual Employers. The Individual Employers shall not be required to make any further payments or Contributions to the cost of operations of the Fund or of the Pension Plan, except as may be hereinafter provided in the Collective Bargaining Agreements." App. 30–31.

[3] Article VII, § 4, of the Plan provides as follows:

"This Pension Plan has been adopted on the basis of an actuarial calculation which has established, to the extent possible, that the contributions will, if continued, be sufficient to maintain the Plan on a permanent basis. However, it is recognized that the benefits provided by this Pension Plan can be paid only to the extent that the Plan has available adequate resources for those payments. No Individual Employer has any liability, directly or indirectly to provide the benefits established by this Plan beyond the obligation of the Individual Employer to make contributions as stipulated in any Collective Bargaining Agreement. In the event that at any time the Pension Fund does not have sufficient assets to permit continued payments under this Pension Plan, nothing contained in this Pension Plan and the Trust Agreement shall be construed as obliging any Individual Employer to make benefit payments or contributions (other than the con-

In 1975, the Trustees filed suit, seeking declaratory and injunctive relief, claiming that the Pension Plan is a "defined contribution plan" as defined by ERISA, and thus not subject to the jurisdiction of the PBGC.[4] Alternatively, the Trustees argued that if the Plan was subject to the provisions of ERISA requiring premium payments and imposing contingent termination liability, the statute was unconstitutional, as it deprived the Trustees, the employers, and the plan participants of property without due process and without proper compensation.

The District Court granted summary judgment to the Trustees, finding that the Plan was a "defined contribution plan," and enjoining the PBGC from treating it in any other manner. *Connolly* v. *Pension Benefit Guaranty Corporation*, 419 F. Supp. 737 (CD Cal. 1976). The Ninth Circuit reversed and remanded for consideration of the constitutional issues. *Connolly* v. *Pension Benefit Guaranty Corporation*, 581 F. 2d 729 (1978), cert. denied, 440 U. S. 935 (1979). On remand, the District Court denied the Trustees' motion to convene a three-judge court on the ground that the Trustees' constitutional challenges were insubstantial. App. 55–56. The Trustees sought a petition of mandamus on the issue, but their petition was denied by both the Ninth Circuit and this Court. *Connolly* v. *Williams*, No. 79–7580 (Jan. 14,

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tributions for which the Individual Employer may be obliged by any Collective Bargaining Agreement) in order to provide for the benefits established by the Pension Plan. Likewise, there shall be no liability upon the Board of Trustees, individually or collectively, or upon the Employers, Signatory Association, Individual Employer, or Union to provide the benefits established by this Plan if the Pension Fund does not have the assets to make such benefit payments." *Id.*, at 31–32.

[4] Title 29 U. S. C. § 1002(34) describes a "defined contribution plan" as "a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account." The Plan Termination Insurance provisions of ERISA do not apply to such plans. § 1321(b)(1).

1980); *Connolly* v. *United States District Court*, 445 U. S. 959 (1980).

On the merits, the District Court granted summary judgment to the PBGC, but the Ninth Circuit reversed. 673 F. 2d 1110 (1982). The court could not agree with the District Court that the constitutional claims raised by the Trustees were so "insubstantial" that a three-judge panel could be summarily denied. *Id.*, at 1114. The Ninth Circuit remanded the case with directions to convene a three-judge court.

During the course of the litigation to convene the three-judge court, Congress enacted the MPPAA. The District Court permitted the Trustees to file an amended complaint to include a challenge to the constitutionality of the new Act. The court also permitted appellant Woodward Sand Co., an employer that had been assessed withdrawal liability by the Trustees, to intervene in the action. App. 82.[5]

After oral argument, the three-judge panel granted summary judgment in favor of the PBGC. The court rejected appellants' argument that the Act violated the Taking Clause of the Fifth Amendment, holding that "the contractual right which insulates employers from further liability to the pension plans in which they participate is not 'property' within the meaning of the takings clause." 631 F. Supp. 640, 645 (1984). Because the court resolved this issue "on the basis that no 'property' is affected by the MPPAA," it did not discuss whether a "taking" had occurred, or whether the taking would have been for a "public purpose." *Ibid.*[6]

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[5] Penfield & Smith, Inc., Roy L. Klema Engineers, Inc., and Municipal Engineers, Inc., also intervened in the proceedings before the District Court. These employers are not parties to this appeal, however, as the Trustees have determined that they have incurred no liability under the Act. Brief for Appellant in No. 84-1567, p. ii.

[6] The three-judge court also rejected appellants' arguments that the MPPAA violated due process, the Contract Clause, and several other constitutional provisions. See App. to Juris. Statement in No. 84-1555, pp. 8-14.

Both the Trustees and Woodward Sand Co. invoked the appellate jurisdiction of this Court under 28 U. S. C. § 1253. We noted probable jurisdiction, 472 U. S. 1006 (1985), and now affirm.

II

Appellants challenge the District Court's conclusion that the Act does not effect a taking of "property" within the meaning of the Taking Clause of the Fifth Amendment. Rather than specifically asserting that the contractual limitation of liability is property, however, appellants argue that the imposition of noncontractual withdrawal liability violates the Taking Clause by requiring employers to transfer their assets for the private use of pension trusts and, in any event, by requiring an uncompensated transfer.[7]

The panel's decision upholding the constitutionality of the MPPAA is consistent with the result reached by every other court to have considered the issue. *Keith Fulton & Sons, Inc.* v. *New England Teamsters and Trucking Industry Pension Fund,* 762 F. 2d 1124 (CA1 1984), modified on other grounds, 762 F. 2d 1137 (1985); *Board of Trustees of Western Conference of Teamsters Pension Trust Fund* v. *Thompson Building Materials, Inc.,* 749 F. 2d 1396 (CA9 1984), cert. denied, 471 U. S. 1054 (1985); *Terson Co.* v. *Bakery Drivers and Salesmen Local 194,* 739 F. 2d 118 (CA3 1984); *Washington Star Co.* v. *International Typographical Union Negotiated Pension Plan,* 235 U. S. App. D. C. 1, 729 F. 2d 1502 (1984); *Textile Workers Pension Fund* v. *Standard Dye & Finishing Co.,* 725 F. 2d 843 (CA2), cert. denied *sub nom. Sibley, Lindsay & Curr Co.* v. *Bakery Workers,* 467 U. S. 1259 (1984); *Peick* v. *Pension Benefit Guaranty Corporation,* 724 F. 2d 1247 (CA7 1983), cert. denied, 467 U. S. 1259 (1984); *Republic Industries, Inc.* v. *Teamsters Joint Council No. 83 of Virginia Pension Fund,* 718 F. 2d 628 (CA4 1983), cert. denied, 467 U. S. 1259 (1984); *Dorn's Transportation, Inc.* v. *I. A. M. National Pension Fund Benefit Plan,* 578 F. Supp. 1222 (DC 1984), aff'd, 243 U. S. App. D. C. 348, 753 F. 2d 166 (1985); *Speckmann* v. *Paddock Chrysler Plymouth, Inc.,* 565 F. Supp. 469 (ED Mo. 1983). In *Keith Fulton, Thompson Building Materials, Terson, Peick, Republic Industries, Dorn,* and *Speckmann,* the Taking Clause claim was directly at issue.

[7] Appellant Trustees make two additional arguments as well. First, they argue that if the imposition of withdrawal liability is invalid under the Taking Clause, then the related provisions of the MPPAA requiring multi-

We agree that an employer subject to withdrawal liability is permanently deprived of those assets necessary to satisfy its statutory obligation, not to the Government, but to a pension trust. If liability is assessed under the Act, it constitutes a real debt that the employer must satisfy, and it is not an obligation which can be considered insubstantial. In the present litigation, for example, appellant Woodward Sand Co.'s withdrawal liability, after the Trustees' assessment was reduced by an arbitrator, was approximately $200,000, or nearly 25% of the firm's net worth. Juris. Statement in No. 84-1567, p. 7, n. 7.

But appellants' submission—that such a statutory liability to a private party always constitutes an uncompensated taking prohibited by the Fifth Amendment—if accepted, would

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employer plans to pay premiums to the PBGC are also invalid, as they are inseverable from the overall statutory scheme. Second, the Trustees contend that the statutory provisions requiring multiemployer plans to pay premiums to the PBGC and authorizing the PBGC to use the funds "in its discretion" to pay benefits to participants of a terminated multiemployer plan violate the principle of separation of powers by delegating legislative authority to the PBGC.

Because we find that the withdrawal liability provisions of the Act are valid under the Taking Clause, we need not address the Trustees' first assertion. As to the Trustees' separation-of-powers contention, we find little merit in this argument. Title 29 U. S. C. § 1381(c)(2)(B) (1976 ed.) stated that the PBGC was to pay benefits if it determined that "the payment . . . of benefits guaranteed under [ERISA] with respect to that plan [would] not jeopardize the payments the [PBGC] anticipate[d] it may be required to make in connection with [the mandatory guarantee program]." Congress delegated discretionary, rather than mandatory, coverage for multiemployer plans prior to 1980 because it needed "time for thorough consideration of the complex issues posed by the termination of multiemployer pension plans." *Pension Benefit Guaranty Corporation* v. *R. A. Gray & Co.*, 467 U. S. 717, 721, n. 1 (1984). In these circumstances, the delegation of discretionary authority was a reasonable means of achieving congressional aims, and we are not persuaded that Congress failed to provide a clear "intelligible principle" to guide the PBGC in the exercise of this authority under the Act. See *J. W. Hampton, Jr., & Co.* v. *United States*, 276 U. S. 394, 409 (1928).

prove too much. In the course of regulating commercial and other human affairs, Congress routinely creates burdens for some that directly benefit others. For example, Congress may set minimum wages, control prices, or create causes of action that did not previously exist. Given the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another. In *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1 (1976), we sustained a statute requiring coal mine operators to compensate former employees disabled by pneumoconiosis, even though the operators had never contracted for such liability, and the employees involved had long since terminated their connection with the industry. We said: "[O]ur cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. . . . This is true even though the effect of the legislation is to impose a new duty or liability based on past acts." *Id.*, at 15–16 (citations omitted).

Relying on *Turner Elkhorn*, we also rejected a due process attack on the imposition, under the statute now before us, of withdrawal liability on employers who withdrew before the effective date of the 1978 amendments. We held that Congress had acted within its powers and for sound reasons. *Pension Benefit Guaranty Corporation* v. *R. A. Gray & Co.*, 467 U. S. 717 (1984). Although both *Gray* and *Turner Elkhorn* were due process cases, it would be surprising indeed to discover now that in both cases Congress unconstitutionally had taken the assets of the employers there involved.

Appellants' claim of an illegal taking gains nothing from the fact that the employer in the present litigation was protected by the terms of its contract from any liability beyond the specified contributions to which it had agreed. See nn. 2, 3, *supra*. "Contracts, however express, cannot fetter the constitutional authority of Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them." *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240, 307–308 (1935).

If the regulatory statute is otherwise within the powers of Congress, therefore, its application may not be defeated by private contractual provisions. For the same reason, the fact that legislation disregards or destroys existing contractual rights does not always transform the regulation into an illegal taking. *Bowles* v. *Willingham*, 321 U. S. 503, 517 (1944); *Omnia Commercial Co.* v. *United States*, 261 U. S. 502, 508–510 (1923). This is not to say that contractual rights are never property rights or that the Government may always take them for its own benefit without compensation. But here, the United States has taken nothing for its own use, and only has nullified a contractual provision limiting liability by imposing an additional obligation that is otherwise within the power of Congress to impose. That the statutory withdrawal liability will operate in this manner and will redound to the benefit of pension trusts does not justify a holding that the provision violates the Taking Clause and is invalid on its face.

This conclusion is not inconsistent with our prior Taking Clause cases. See, *e. g.*, *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986 (1984); *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419 (1982); *Hodel* v. *Virginia Surface Mining & Reclamation Assn.*, 452 U. S. 264 (1981); *Kaiser Aetna* v. *United States*, 444 U. S. 164 (1979); *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104 (1978). In all of these cases, we have eschewed the development of any set formula for identifying a "taking" forbidden by the Fifth Amendment, and have relied instead on ad hoc, factual inquiries into the circumstances of each particular case. *Monsanto Co.*, *supra*, at 1005; *Kaiser Aetna*, *supra*, at 175. To aid in this determination, however, we have identified three factors which have "particular significance": (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." *Penn Central Transportation Co.*, *supra*, at 124. Accord, *Monsanto Co.*, *supra*, at 1005; *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, 82–83 (1980). Examining the MPPAA in light of these factors reinforces our belief that the imposition of withdrawal liability does not constitute a compensable taking under the Fifth Amendment.

First, with respect to the nature of the governmental action, we already have noted that, under the Act, the Government does not physically invade or permanently appropriate any of the employer's assets for its own use. Instead, the Act safeguards the participants in multiemployer pension plans by requiring a withdrawing employer to fund its share of the plan obligations incurred during its association with the plan. This interference with the property rights of an employer arises from a public program that adjusts the benefits and burdens of economic life to promote the common good and, under our cases, does not constitute a taking requiring Government compensation. *Penn Central Transportation Co.*, *supra*, at 124; *Usery* v. *Turner Elkhorn Mining Co.*, *supra*, at 15, 16. See *Andrus* v. *Allard*, 444 U. S. 51, 65 (1979); *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 413 (1922).

Next, as to the severity of the economic impact of the MPPAA, there is no doubt that the Act completely deprives an employer of whatever amount of money it is obligated to pay to fulfill its statutory liability. The assessment of withdrawal liability is not made in a vacuum, however, but directly depends on the relationship between the employer and the plan to which it had made contributions. Moreover, there are a significant number of provisions in the Act that moderate and mitigate the economic impact of an individual employer's liability.[8] There is nothing to show that the withdrawal liability actually imposed on an employer will always be out of proportion to its experience with the plan, and the mere fact that the employer must pay money to comply with the Act is but a necessary consequence of the MPPAA's regulatory scheme.

The final inquiry suggested for determining whether the Act constitutes a "taking" under the Fifth Amendment is whether the MPPAA has interfered with reasonable investment-backed expectations. Appellants argue that the only monetary obligations incurred by each employer involved in the Operating Engineers Pension Plan arose from the specific terms of the Plan and Trust Agreement between the employers and the union, and that the imposition of withdrawal liability upsets those reasonable expectations. Pension plans, however, were the objects of legislative concern long before the passage of ERISA in 1974, and surely as of that time, it was clear that if the PBGC exercised its discretion to pay benefits upon the termination of a multiemployer pension plan, employers who had contributed to the plan during the preceeding five years were liable for their proportionate share of the plan's contributions during that period. 29 U. S. C. § 1364. It was also plain enough that the purpose of imposing withdrawal liability was to ensure that employees would receive the benefits promised them. When it became evident that ERISA fell short of achieving this end, Congress adopted the 1980 amendments. Prudent employers then had more than sufficient notice not only that pension plans were currently regulated, but also that withdrawal itself might trigger additional financial obligations. See *Gray*, 467 U. S., at 732. "Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *FHA* v. *The Darlington, Inc.*, 358 U. S. 84, 91 (1958). See also *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S., at 15–16 and cases cited therein.

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[8] Several sections of the Act moderate the impact of a withdrawing employer's liability by exempting certain transactions from being characterized as "withdrawals." See, *e. g.*, 29 U. S. C. §§ 1383(b), (c) (applying special definitions for determining whether there has been a complete or partial withdrawal from a pension plan in the building and construction industry and in the entertainment industry); § 1384 (cessation or reduction of contribution obligations as a result of an employer's sale of its assets does not result in a withdrawal, provided certain other conditions are met); § 1398(1) (change of corporate structure where successor continues to contribute to plan is not a withdrawal); § 1398(2) (withdrawal does not occur where employer suspends contributions to plan during labor dispute involving its employees).

Other sections reduce the size of the financial liability in various instances. See, *e. g.*, 29 U. S. C. § 1389(a) (creating a *de minimis* rule which eliminates withdrawal liability entirely for an employer whose obligation would be equal to or less than the smaller of (1) $^3/_4$ of 1% of the plan's unfunded vested obligations; or (2) $50,000); § 1405(a)(1) (limiting withdrawal liability for employer who liquidates his business); § 1390(a)(2) (establishing a "free look" provision, whereby new employers may withdraw without liability if they had an obligation to contribute for no more than six consecutive plan years, or, if shorter, the number of years required for vesting under the plan).

The purpose of forbidding uncompensated takings of private property for public use is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U. S. 40, 49 (1960). We are far from persuaded that fairness and justice require the public, rather than the withdrawing employers and other parties to pension plan agreements, to shoulder the responsibility for rescuing plans that are in financial trouble. The employers in the present litigation voluntarily negotiated and maintained a pension plan which was determined to be within the strictures of ERISA. We do not know, as a fact, whether this plan was underfunded, but Congress determined that unregulated withdrawals from multiemployer plans could endanger their financial vitality and deprive workers of the vested rights they were entitled to anticipate would be theirs upon retirement. For this reason, Congress imposed withdrawal liability as one part of an overall statutory scheme to safeguard the solvency of private pension plans. We see no constitutionally compelled reason to require the Treasury to assume the financial burden of attaining this goal.

The judgment of the three-judge court is

Affirmed.

JUSTICE O'CONNOR, with whom JUSTICE POWELL joins, concurring.

Today the Court upholds the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) against a facial challenge to their validity based on the Taking Clause of the Fifth Amendment. I join the Court's opinion and agree with its reasoning and its result, but I write separately to emphasize some of the issues the Court does *not* decide today. Specifically, the Court does not decide today, and has left open in previous cases, whether the imposition of withdrawal liability under the MPPAA and of plan termination liability under the Employee Retirement Income Security Act of 1974 (ERISA) may in some circumstances be so arbitrary and irrational as to violate the Due Process Clause of the Fifth Amendment. See *Pension Benefit Guaranty Corporation* v. *R. A. Gray & Co.*, 467 U. S. 717, 728, n. 7 (1984); *Nachman Corp.* v. *Pension Benefit Guaranty Corporation*, 446 U. S. 359, 367–368 (1980). The Court also has no occasion to decide whether the MPPAA may violate the Taking Clause as applied in particular cases, or whether the pension plan in this case is a defined benefit plan rather than a defined contribution plan within the meaning of ERISA.

As the Court indicates, the mere fact that "legislation requires one person to use his or her assets for the benefit of another," *ante*, at 223, will not establish either a violation of the Taking Clause or the Due Process Clause. With regard to the latter provision, it is settled that in the field of economic legislation "the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 15 (1976). Nonetheless, the Court has never intimated that Congress possesses unlimited power to "readjus[t] rights and burdens . . . [and] upse[t] otherwise settled expectations." *Turner Elkhorn, supra*, at 16. Our recent cases leave open the possibility that the imposition of retroactive liability on employers for the benefit of employees may be arbitrary and irrational in the absence of any connection between the employer's conduct and some detriment to the employee. See *Turner Elkhorn, supra*, at 19, 24–26; *Pension Benefit Guaranty Corporation* v. *R. A. Gray & Co., supra*, at 733 (discussing *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330 (1935)).

Insofar as the application of the provisions of the MPPAA and of ERISA to pension benefits that accrue in the future is concerned, there can be little doubt of Congress' power to override contractual provisions limiting employer liability for unfunded benefits promised to employees under the plan. But both statutes impose liability under certain circumstances on contributing employers for unfunded benefits that accrued in the past under a pension plan whether or not the employers had agreed to ensure that benefits would be fully funded. In my view, imposition of this type of retroactive liability on employers, to be constitutional, must rest on some basis in the employer's conduct that would make it rational to treat the employees' expectations of benefits under the plan as the employer's responsibility.

In enacting ERISA, Congress distinguished between two types of employee retirement benefit plans: "defined benefit plan[s]" and "defined contribution plan[s]," also known as "individual account plan[s]." See 29 U. S. C. §§ 1002(34), (35). An employer is subject to plan termination liability under ERISA only if the employee benefit plan to which the employer has contributed is covered by ERISA's plan termination insurance program, which applies to defined benefit plans but not to defined contribution plans. 29 U. S. C. § 1321(b)(1). See *Nachman Corp.* v. *Pension Benefit Guaranty Corporation, supra,* at 363, n. 5. Congress exempted defined contribution plans from ERISA's termination insurance program because a defined contribution plan does not specify benefits to be paid, but instead establishes an individual account for each participant to which employer contributions are made. 29 U. S. C. § 1002(34). "[U]nder such plans, by definition, there can never be an insufficiency of funds in the plan to cover promised benefits." *Nachman Corp., supra,* at 364, n. 5.

By contrast, whenever a plan defines the benefits payable thereunder, the possibility exists that at a given time plan assets will fall short of the present value of vested plan benefits. Congress therefore subjected defined benefit plans to ERISA's plan termination insurance program, and did so by broadly defining a defined benefit plan as "a pension plan other than an individual account plan." 29 U. S. C. § 1002(35). We have no occasion today to decide whether this definition sweeps in all plans in which the benefits to be received by employees are fixed by the terms of the plan, even if the plan also provides that the employer's contributions shall be fixed and shall not be adjusted to whatever level would be required to provide those benefits. Indeed, this litigation began in part as a challenge by the Trustees of the Operating Engineers Pension Plan to a determination by the Pension Benefit Guaranty Corporation (hereinafter PBGC) that the Pension Plan is a defined benefit plan. See *ante,* at 219. That challenge was resolved against the Trustees and is not presented here.

ERISA's broad definition of defined benefit plan may well mean that Congress imposed contingent liability on contributing employers without regard to the extent of a particular employer's actual responsibility for the existence of a plan's promise of fixed benefits to employees and without regard to the extent to which any such promise was conditioned—and understood by employees to be conditioned—by plan provisions limiting the employer's obligations to make contributions to the plan. If so, the application of ERISA may in some circumstances raise constitutional doubts under the Taking Clause or the Due Process Clause.

The same doubts arise with respect to the imposition of withdrawal liability under the MPPAA, which is properly seen as a prophylactic extension of the liability initially imposed by ERISA. Withdrawal liability is intended to ensure that "'an employer withdrawing from a multiemployer plan w[ill] . . . complete funding its fair share of the plan's unfunded liabilities,'" *R. A. Gray & Co.*, 467 U. S., at 723, n. 3 (quoting Pension Plan Termination Insurance Issues: Hearings before the Subcommittee on Oversight of the House Committee on Ways and Means, 95th Cong., 2d Sess., 23 (1978) (statement of Matthew M. Lind, Executive Director of PBGC), and thus presupposes that employers can be made liable for those unfunded liabilities in the first instance. Although the MPPAA substitutes liability to the plan for liability to PBGC, the withdrawal liability it imposes on employers who contribute to multiemployer plans reflects the same apparent determination to treat all definite benefits as promises for which the employer can be held liable that underlies termination liability under ERISA. PBGC coverage of a multiemployer plan continues to turn on whether it is a defined benefit plan, and the MPPAA defines the withdrawing employer's liability to the plan in terms of "unfunded vested benefits," 29 U. S. C. § 1391, thereby making withdrawal liability turn on the presence of fixed benefits. The MPPAA's termination liability provisions are complex, but their overall effect is also to hold employers liable for underfunding of vested fixed benefits. See 29 U. S. C. § 1341a. Thus, it is evident that the MPPAA expands on Congress' decision in ERISA to exempt only defined contribution plans, narrowly defined, from PBGC coverage and employer liability. Whether the employer's liability is to

PBGC or to the plan, the thrust of both statutes is to enforce the plan's promise of fixed benefits against the employer with respect to benefits already accrued.

The degree to which an employer can be said to be responsible for the promise of benefits made by a plan varies dramatically across the spectrum of plans. Where a single employer has unilaterally adopted and maintained a pension plan for its employees, the employer's responsibility for the presence of a promise to pay defined benefits is direct and substantial. The employer can nominate all the plan's trustees and enjoys wide discretion in designing the plan and determining the level of benefits. Where such a plan holds out to employees a promise of definite benefits, and where employees have rendered the years of service required for benefits to accrue and vest, it seems entirely rational to hold the employer liable for any shortfall in the plan's assets, even if the plan's provisions purport to limit the employer's liability in the event of underfunding upon plan termination.

Where a pension plan is established through collective bargaining between one or more employers and a union, matters may be different. Such plans, commonly known as "Taft-Hartley" plans, were authorized by § 302(c)(5) of the Labor Management Relations Act, 1947 (LMRA), 61 Stat. 157, codified, as amended, at 29 U. S. C. § 186(c)(5). Taft-Hartley plans are the product of joint negotiation between employers and a union representing employees and are administered by trustees nominated in equal numbers by employers and the union. *Ibid.* Unlike typical defined benefit plans, which call for variable employer contributions and provide for fixed benefits, most Taft-Hartley plans "possess the characteristics of both fixed contributions and fixed benefits." J. Melone, Collectively Bargained Multi-Employer Pension Plans 20 (1963) (hereinafter Melone). As PBGC has explained:

> "Employers participating in multiemployer plans are generally required to contribute at a fixed rate, specified

> in the collective bargaining agreement. . . . Traditionally, the multiemployer plan or the bargaining agreement have limited the employer's contractual obligation to contribute at the fixed rate, whether or not the contributions were sufficient to provide the benefits established by the joint board or the collectively bargained agreement." Pension Benefit Guaranty Corporation, Multiemployer Study Required by P. L. 95–214, p. 22 (1978) (hereinafter Multiemployer Study).

See also Melone 50; Goetz, Developing Federal Labor Law of Welfare and Pension Plans, 55 Cornell L. Rev. 911, 931 (1970).

Under these hybrid Taft-Hartley plans it is the plans' trustees, not the employers and the union, who are "usually responsible for determining the types of benefits to be provided . . . and the level of benefits, although in some cases these are set in the collective bargaining agreement." Multiemployer Study 22 (footnote omitted). See also GAO/HRD–85–58, Comptroller General's Report to the Congress, Effects of the Multiemployer Pension Plan Amendments Act on Plan Participants' Benefits, 37, App. I, Table 3 (June 14, 1985) (95% of 139 multiemployer plans surveyed provided that trustees set benefits) (hereinafter Report to the Congress). This delegation of responsibility to the trustees may well stem from an understanding on the part of employers and unions that under the fixed-contribution approach the plan rather than the employers would bear the risks of adverse experience and the benefits of favorable experience in the first instance. See Pension Plans Under Collective Bargaining: A Reference Guide for Trade Unions 64 (American Federation of Labor 1953). If the actuary's earnings assumptions proved too conservative, the plan would have excess assets that could be used to support an increase in benefits by the trustees, and if asset growth was lower than anticipated, benefits could be reduced. It now appears that Taft-Hartley plan employers will be liable for such experience losses in many cases, even where withdrawal occurs as a result of events over which an employer has no control, and even though experience gains can still ordinarily be used to increase benefits.

It is also noteworthy that, as this Court held in *NLRB* v. *Amax Coal Co.*, 453 U. S. 322, 331–332 (1981), "the duty of the management-appointed trustee of an employee benefit fund under § 302(c)(5) is directly antithetical to that of an agent of the appointing party." ERISA conclusively established that "an employee benefit fund trustee is a fiduciary whose duty to the trust beneficiaries must overcome any loyalty to the interest of the party that appointed him." *Id.*, at 334. In light of these fiduciary duties, it seems remarkable to impute responsibility to employers for the level of benefits promised by the plan and set by the joint board of trustees, notwithstanding the express limits on employer liability contained in the plan and agreed to in collective bargaining.

Yet that would appear to be what Congress may have done to the extent a Taft-Hartley plan such as the pension plan in this case is treated as a pure defined benefit plan in which the employer promised to make contributions to the extent necessary to fund the fixed benefits provided in the plan. As Representative Erlenborn put it in the hearings on the MPPAA:

> "[W]e have taken something that neither looked like a duck, or walked like a duck, or quacked like a duck, and we passed a law [ERISA] and said, 'It is a duck.' If it is that easy, I suppose we can repeal the law of gravity and solve our energy problem. It is treating the multiemployer plans where you negotiate a *contribution* as having put a legal obligation on the employer to reach a level of *benefits* that has caused the problem." Hearings on The Multiemployer Pension Plan Amendments Act of 1979 before the Task Force on Welfare and Pension Plans of the Subcommittee on Labor-Management

> Relations of the House Committee on Education and Labor, 96th Cong., 391 (1980) (emphasis added).

The foregoing observations suggest to me that whatever promises a collectively bargained plan makes with respect to benefits may not always be rationally traceable to the employer's conduct and that it may sometimes be quite fictitious to speak of such plans as "promising" benefits at a specified level, since to do so ignores express and bargained-for conditions on those promises. Where the plan's fixed-contribution aspects were agreed to by employees through their exclusive bargaining representatives, and where employers had no control over the level of benefits promised, employer responsibility for the benefits specified by the plan is very much attenuated, and employee expectations that those benefits will in all events be paid, in the face of plan language to the contrary, are not easily traceable to the employer's conduct.

The possible arbitrariness of imposing termination and withdrawal liability on some employers contributing to fixed-cost Taft-Hartley plans may be heightened in particular cases. For example, an employer who agrees to participate in a multiemployer plan long after the plan's benefit structure has been determined may have had no say whatever in establishing critical features of the plan that determine the level of benefits and the value of those benefits. Similarly, if a plan had regularly undergone increases and reductions in accrued benefits prior to ERISA, any contention that employers caused employees to rely on a promise of fixed benefits might carry even less weight.

Beyond that, the withdrawal provisions of the MPPAA are structured in a manner that may lead to extremely harsh results. For example, it appears that even if the trustees raised benefits for both retired and current employees during the period immediately prior to an employer's withdrawal, the withdrawing employer can be held liable for the resulting underfunding. Such benefit increases are not uncommon.

See Report to the Congress 43, App. I, Table 17 (68% of multiemployer plans surveyed increased benefits for working participants during 33 months prior to enactment of the MPPAA); Table 18 (46% of these plans increased retirees' benefits during the same period). In addition, the presumptive method for calculating employer withdrawal liability is based on the employer's proportionate share of the *contributions* made to the plan during the years in which the employer participated. 29 U. S. C. § 1391(b). As a result, because fixed-contribution plans typically do not set each employer's contributions on the basis of the value of the benefits accrued by that employer's employees, it seems entirely possible that an employer may be liable to the plan for substantial sums even though that employer's contributions plus its allocable share of plan earnings *exceed* the present value of all benefits accrued by its employees.

To be sure, the Court does not address these questions today. Since this case involves only a facial challenge under the Taking Clause to the MPPAA's withdrawal liability provisions, the Court properly refuses to look into the possibility that harsh results such as those I have noted may affect its analysis, let alone a due process inquiry, when the MPPAA is applied in particular cases. I write only to emphasize some of the issues the Court does not decide today, and to express the view that termination liability under ERISA, and withdrawal liability under the MPPAA, impose substantial retroactive burdens on employers in a manner that may drastically disrupt longstanding expectations, and do so on the basis of a questionable rationale that remains open to review in appropriate cases.

MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY *v.* MATHEWS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 84-1636. Argued November 4, 1985—Decided February 26, 1986

Respondent and another man (Daugherty) robbed a bank in Ohio. After an automobile chase, the police surrounded the two men when they stopped at a farmhouse. Thereafter, the police heard shots fired inside the house, and respondent emerged from the house and surrendered. The police then entered the house and found Daugherty dead. Based on the Coroner's opinion that Daugherty had committed suicide, the State did not charge respondent with Daugherty's death but with aggravated robbery. Respondent pleaded guilty, but two days later admitted having shot Daugherty. Respondent was then indicted for aggravated murder based on the bank robbery. The state trial court denied his pretrial motion to dismiss the indictment as violative of the Double Jeopardy Clause of the Fifth Amendment, and he was found guilty after a jury trial. Ultimately, the Ohio Court of Appeals, finding that the Double Jeopardy Clause barred respondent's conviction for aggravated murder, modified that conviction to that of the lesser included offense of murder. After the Ohio Supreme Court denied respondent's motion to appeal, he sought a writ of habeas corpus in Federal District Court, which denied the petition. The Federal Court of Appeals reversed. Apparently agreeing with respondent's assertion that evidence was admitted at his trial for aggravated murder that would have been inadmissible in a trial for murder and stating that the jury "may have been prejudiced" by that evidence, the court held that respondent had established a "reasonable possibility" that he was prejudiced by the double jeopardy violation sufficient to warrant a new trial on the murder charge.

Held: Reducing respondent's concededly jeopardy-barred conviction for aggravated murder to a conviction for murder that concededly was not jeopardy barred was an adequate remedy for the double jeopardy violation. Pp. 244-248.

(a) When a jeopardy-barred conviction is reduced to a conviction for a lesser included offense that is not jeopardy barred, the burden shifts to the defendant to demonstrate a reasonable probability (*i.e.*, a probability sufficient to undermine confidence in the outcome) that he would not have been convicted of the nonjeopardy-barred offense absent the presence of the jeopardy-barred offense. Where it is clear that the jury necessarily found that the defendant's conduct satisfies the elements of the lesser included offense, it would be incongruous to order another trial as a means of curing the double jeopardy violation. Pp. 244–247.

(b) Here, the Federal Court of Appeals' legal and factual basis for ordering the writ of habeas corpus was seriously flawed. Its "reasonable possibility" standard was not sufficiently demanding, it did not expressly say that it agreed with respondent that certain evidence admitted at his trial would not have been admitted in a separate trial for murder nor did it refer to any Ohio authorities, and its observation that the admission of such evidence "may have prejudiced the jury" falls far short of a considered conclusion that if the evidence at issue was not before the jury in a separate trial for murder, there was a reasonable probability that respondent would not have been convicted. Pp. 247–248.

754 F. 2d 158, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment, in which POWELL, J., joined, *post*, p. 248. BRENNAN, J., *post*, p. 257, and MARSHALL, J., *post*, p. 258, filed dissenting opinions.

Richard David Drake, Assistant Attorney General of Ohio, argued the cause for petitioner. With him on the brief was *Anthony J. Celebrezze, Jr.*, Attorney General.

Michael George Dane argued the cause for respondent. With him on the brief was *Edward F. Marek*.

JUSTICE WHITE delivered the opinion of the Court.

The question presented in this case is whether a state appellate court provided an adequate remedy for a violation of the Double Jeopardy Clause of the Fifth Amendment by modifying a jeopardy-barred conviction to that of a lesser included offense that is not jeopardy barred.

I

On February 17, 1978, respondent James Michael Mathews and Steven Daugherty robbed the Alexandria Bank in Alexandria, Ohio. After an automobile chase, the police finally surrounded the two men when they stopped at a farmhouse. Soon thereafter, the police heard shots fired inside the house, and respondent then emerged from the home and surrendered to police. When the officers entered the house, they found Daugherty dead, shot once in the head and once in the chest. The police also found the money stolen from the bank hidden in the pantry.

Once in custody, respondent gave a series of statements to law enforcement officials. In his first statement, given one hour after his surrender, respondent claimed that Daugherty and another man had forced him to aid in the bank robbery by threatening to kill both respondent and his girlfriend. Respondent denied shooting Daugherty. In the second statement, given the same day, respondent again denied shooting Daugherty, but admitted that no other man was involved with the robbery, and that he and Daugherty alone had planned and performed the crime.

Two days later, respondent gave a third statement to police in which he again confessed to robbing the bank. Respondent also related that after he and Daugherty arrived at the farmhouse, he had run back out to their van to retrieve the stolen money, and on his way back inside, he "heard a muffled shot from inside the house." App. 4. Upon investigation, respondent discovered that Daugherty had shot himself in the head. Respondent claimed that Daugherty was still conscious, and called to him by name. *Ibid.*

The County Coroner initially ruled Daugherty's death to be a suicide. The Coroner made this determination, however, before receiving the results of an autopsy performed by a forensic pathologist. This report indicated that Daugherty had received two wounds from the same shotgun. The initial shot had been fired while Daugherty was standing, and entered the left side of his face. This shot fractured Daugherty's skull, and the mere force of the blast would have rendered him immediately unconscious. This wound was not fatal. The second shot was fired while Daugherty was lying on his back, and was fired directly into his heart from extremely close range. This shot was instantaneously fatal.

As a result of this evidence, the Coroner issued a supplemental death certificate, listing "multiple gun shot wounds" as the cause of death. Record 295.

Based on the Coroner's first opinion that Daugherty took his own life, the State did not charge respondent with Daugherty's death. Instead, he was indicted under Ohio Rev. Code Ann. § 2911.01 (Supp. 1984) on aggravated robbery charges.[1] Respondent pleaded guilty on May 17 and was sentenced to a term of incarceration of from 7 to 25 years.

Two days after entering his guilty plea, respondent made the first of two statements in which he admitted having shot Daugherty. Respondent maintained that Daugherty initially had shot himself in the head, and that he was still alive when respondent discovered him after returning to the farmhouse with the stolen money. Acting on the theory that, if Daugherty were dead, respondent could claim that he was kidnaped and had not voluntarily robbed the bank, respondent "put [the gun] an inch or two from [Daugherty's] chest and pulled the trigger." App. 6.[2] Respondent's second

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[1] Ohio Rev. Code Ann. § 2911.01 (Supp. 1984) states:

"(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after such attempt or offense, shall do either of the following:

"(1) Have a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code, on or about his person or under his control;

"(2) Inflict, or attempt to inflict serious physical harm on another.

"(B) Whoever violates this section is guilty of aggravated robbery, an aggravated felony of the first degree."

Respondent was also indicted for theft of the van used in the robbery and for burglary.

[2] Respondent's handwritten statement, in pertinent part, reads as follows:

"At that time I ask steve were the money was and he said it was still out in the van. I tould him to cover me I was going out in the van to get the money. He said to me right before I went out to be careful and then I went out to the van, and when I was out there getting ready to come back in I heard a muffled shot and I ran in and yelled for steve. I then heard statement, given one week later, reiterated these same points. *Id.*, at 8–16.

On June 1, 1978, the State charged respondent with the aggravated murder of Steven Daugherty. Ohio Rev. Code § 2903.01 (1982) defines aggravated murder, in part, as "purposely caus[ing] the death of another . . . while fleeing immediately after committing . . . aggravated robbery."[3] The aggravated robbery referred to in the indictment was the armed robbery of the Alexandria Bank to which respondent had previously pleaded guilty. The state trial court denied respondent's pretrial motion to dismiss the aggravated murder indictment as violative of the Double Jeopardy Clause of the Fifth Amendment.

At the conclusion of the evidence, the trial judge instructed the jury as to the elements of the offense of aggravated mur-

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something like a moning up stairs. I then ran up stairs and seen steve laying there on the floor. He had shot himself somewere in the head and was bleeding pretty bad. He then seen me and said mike, mike, in a moning, and I said oh fuck, he still had the gun in his hand and was trying to load it up but failed and droped it And he then said to me mike mike in a moning voice please shot me. . . . I knew he was in a lot of pain and I couldn't really shot him even though he was in pretty bad shape. But I really didn't want to, but then I said to myself real quick that if he was dead I could say that I was kidnapped. And they couldn't prove that I robbed the bank. So I took 1 shell that was laying in steve hand and put it in the gun and I then I put it about an inch or two from his chest and pulled the trigger. I really don't know much after that but the gun was dropped on the floor not to far from steve body. I then run down stairs and looked for a place to hid the money." App. 5–6.

[3] Ohio Rev. Code Ann. § 2903.01 (1982) provides, in pertinent part, as follows:

"(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

"(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code."

der. The judge also instructed the jury on the lesser included offense of murder as follows:

> "If you find that the State proved beyond a reasonable doubt all of the essential elements of aggravated murder, your verdict must be guilty of that crime and in that event you will not consider any lesser offense.
>
> "But if you find that the State failed to prove the killing was done while the defendant was committing or fleeing immediately after committing aggravated robbery, but that the killing was nonetheless purposely done, you will proceed with your deliberations and decide whether the State has proved beyond a reasonable doubt the elements of the lesser crime or murder.
>
> "The crime of murder is distinguished from aggravated murder by the State's failure to prove that the killing was done while the defendant was committing or fleeing immediately after committing the crime of aggravated robbery." App. 21.

The jury found respondent guilty of aggravated murder, and the court sentenced him to a term of life imprisonment.

Respondent appealed his conviction, claiming that his trial for aggravated murder following his conviction for aggravated robbery violated the Double Jeopardy Clause. The Ohio Court of Appeals, Fifth Judicial District, affirmed his conviction, *State* v. *Mathews*, CA No. 2578 (Licking County, Aug. 9, 1979), and the Ohio Supreme Court declined to grant discretionary review. *State* v. *Mathews*, No. 79-1342 (Dec. 7, 1979). This Court granted respondent's petition for writ of certiorari, vacated the Court of Appeals' judgment, and remanded the case for further consideration in light of *Illinois* v. *Vitale*, 447 U. S. 410 (1980). *Mathews* v. *Ohio*, 448 U. S. 904 (1980).

On remand, the Court of Appeals found that the Double Jeopardy Clause, as construed by this Court in *Vitale*, barred respondent's conviction for aggravated murder. *State* v. *Mathews*, No. 2578 (Licking County, Nov. 7, 1980). The court noted, however, that § 2903.01 defines aggravated murder as purposely causing the death of another while committing certain felonies, and that § 2903.02 defines murder simply as purposely causing the death of another. App. to Pet. for Cert. A–26.[4] In respondent's trial, therefore, "if all the facts relating to the aggravated robbery of which he was convicted are excluded from consideration of the court and jury, the defendant was still charged with and convicted of murder in that he did purposely cause the death of Steven Daugherty on the date charged." *Ibid.* Accordingly, the Court of Appeals modified the conviction of aggravated murder to murder and reduced respondent's sentence to an indefinite term of from 15 years to life. *Id.*, at A–27.[5] Once again, the Ohio Supreme Court denied respondent's motion to appeal, and this Court denied his subsequent petition for certiorari review. *Mathews* v. *Ohio*, 451 U. S. 975 (1981).

Respondent then sought a writ of habeas corpus in federal court. Applying the reasoning of the Ohio Court of Appeals, the District Court denied respondent's petition. *Mathews* v. *Marshall*, No. C-1-81-834 (WD Ohio, Apr. 19, 1983).

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[4] Ohio Rev. Code. Ann. § 2903.02 (1982) provides as follows:

"(A) No person shall purposely cause the death of another.

"(B) Whoever violates this section is guilty of murder, and shall be punished as provided in section 2929.02 of the Revised Code."

[5] The Ohio Court of Appeals relied, in part, on Ohio Rule of Criminal Procedure 31, which states:

"(C) *Conviction of lesser offense.* The defendant may be found not guilty of the offense charged but guilty of an attempt to commit it if such an attempt is an offense at law. When the indictment, information, or complaint charges an offense, including degrees, or if lesser offenses are included within the offense charged, the defendant may be found not guilty of the offense charged but guilty of an inferior degree thereof, or of a lesser included offense."

The court also cited Ohio Rule of Criminal Procedure 33(A)(4):

"(4) That the verdict is not sustained by sufficient evidence or is contrary to law. If the evidence shows the defendant is not guilty of the degree of crime for which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict or finding accordingly, without granting or ordering a new trial, and shall pass sentence on such verdict or finding as modified."

A divided panel of the Court of Appeals for the Sixth Circuit reversed. *Mathews* v. *Marshall*, 754 F. 2d 158 (1985). Although refusing to hold that in a case like this a new trial on the nonbarred charge is always necessary, the court held that "a conviction obtained in violation of the double jeopardy clause cannot be modified if the defendant can show that there was a 'reasonable possibility that he was prejudiced' by the double jeopardy violation," and that "'an exceedingly small showing . . . would suffice.'" *Id.*, at 162, quoting *Graham* v. *Smith*, 602 F. 2d 1078, 1083 (CA2 1979). Apparently agreeing with respondent's assertion that "evidence was admitted in his trial for aggravated murder that would not have been admissible in a trial for murder," and stating that the jury "may have [been] prejudiced" by that evidence, the court concluded that respondent had established a sufficient possibility of prejudice to warrant a new trial on the murder charge. *Mathews* v. *Marshall*, *supra*, at 162.[6]

We granted certiorari, 471 U. S. 1134 (1985), and now reverse.

II

As an initial matter, we note several issues that are not in dispute. First, the State concedes that under our cases the prosecution of respondent for aggravated murder violated the Double Jeopardy Clause. Similarly, respondent concedes that the Clause would not prevent the State from trying him for murder. Next, all of the courts that have reviewed this case have agreed that, in finding respondent guilty of aggravated murder, the jury necessarily found that he "purposely cause[d] the death of another," which is the definition of murder under Ohio Rev. Code Ann. § 2903.02 (1982). See n. 4, *supra*. Finally, this is not a "harmless error" case: allowing respondent to be tried for aggravated murder was error, and it was not in any sense harmless. With these considerations aside, the only issue before us is whether reducing respondent's conviction for aggravated murder to a conviction for murder is an adequate remedy for the double jeopardy violation.

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[6] The dissenting judge was of the view that, even in a separate trial on the murder charges, the rules of evidence would allow the State "to prove the surrounding circumstances, including the facts surrounding the just-completed bank robbery." 754 F. 2d at 162 (Brown, J., dissenting).

Respondent argues that, because the trial for aggravated murder should never have occurred, the Double Jeopardy Clause bars the State from taking advantage of the jeopardy-barred conviction by converting it into a conviction for the lesser crime of murder. He submits that a new trial must be granted whether or not there is a showing of prejudice.

Respondent relies heavily on *Price* v. *Georgia,* 398 U. S. 323 (1970), but his reliance is misplaced. Price was tried for murder and convicted of the lesser included offense of manslaughter. After that conviction was reversed on appeal, there was another trial for murder and another conviction of the lesser crime of manslaughter. We held that the second conviction could not stand because Price had been impliedly acquitted of murder at the first trial and could not be tried again on that charge. *Id.*, at 329. Nor could we "determine whether or not the murder charge against petitioner induced the jury to find him guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence." *Id.*, at 331.

This holding in *Price* did not impose an automatic retrial rule whenever a defendant is tried for a jeopardy-barred crime and is convicted of a lesser included offense. Rather, the Court relied on the likelihood that the conviction for manslaughter had been influenced by the trial on the murder charge—that the charge of the greater offense for which the jury was unwilling to convict also made the jury less willing to consider the defendant's innocence on the lesser charge. That basis for finding or presuming prejudice is not present here. The jury did not acquit Mathews of the greater offense of aggravated murder, but found him guilty of that charge and, *a fortiori*, of the lesser offense of murder as well.

Benton v. *Maryland*, 395 U. S. 784 (1969), also strongly indicates that to prevail here, Mathews must show that trying him on the jeopardy-barred charge tainted his conviction for the lesser included offense. Benton was tried for both larceny and burglary. The jury acquitted him on the larceny count, but found him guilty of burglary. His conviction was later set aside because the jury had been improperly sworn. Benton again was tried for both burglary and larceny, and the second jury found him guilty of both offenses. The Maryland Court of Appeals held there had been no double jeopardy violation, but we disagreed, ruling that the Double Jeopardy Clause required setting aside the larceny conviction and sentence. *Id.*, at 796–797.

Benton urged that his burglary conviction must also fall because certain evidence admitted at his second trial would not have been admitted had he been tried for burglary alone. This evidence, he claimed, prejudiced the jury and influenced their decision to convict him of burglary. We rejected that argument, saying both that "[i]t [was] not obvious on the face of the record that the burglary conviction was affected by the double jeopardy violation," and that we should not make this kind of evidentiary determination "unaided by prior consideration by the state courts." *Id.*, at 798 (footnote omitted). We thus vacated the judgment of the Maryland court, and remanded for further proceedings.

Neither *Benton* nor *Price* suggests that a conviction for an unbarred offense is inherently tainted if tried with a jeopardy-barred charge. Instead, both cases suggest that a new trial is required only when the defendant shows a reliable inference of prejudice. We perceive no basis for departing from this approach here; for except that murder was a lesser offense included in the aggravated murder charge rather than a separate charge, there is no difference between this case and *Benton* for double jeopardy purposes.

Accordingly, we hold that when a jeopardy-barred conviction is reduced to a conviction for a lesser included offense which is not jeopardy barred, the burden shifts to the defendant to demonstrate a reasonable probability that he would not have been convicted of the nonjeopardy-barred offense absent the presence of the jeopardy-barred offense. In this situation, we believe that a "reasonable probability" is a probability sufficient to undermine confidence in the outcome. Cf. *Strickland* v. *Washington*, 466 U. S. 668, 695 (1984). After all, one of the purposes of the Double Jeopardy Clause is to prevent multiple prosecutions and to protect an individual from suffering the embarrassment, anxiety, and expense of another trial for the same offense, *Green* v. *United States*, 355 U. S. 184, 187–188 (1957). In cases like this, therefore, where it is clear that the jury necessarily found that the defendant's conduct satisfies the elements of the lesser included offense, it would be incongruous always to order yet another trial as a means of curing a violation of the Double Jeopardy Clause.

The Court of Appeals thus was correct in rejecting respondent's *per se* submission, but it was nevertheless too ready to find that he had made the necessary showing of prejudice. First, the court's "reasonable possibility" standard, which could be satisfied by "an exceedingly small showing," was not sufficiently demanding. To prevail in a case like this, the defendant must show that, but for the improper inclusion of the jeopardy-barred charge, the result of the proceeding probably would have been different.

Second, the Court of Appeals appeared to agree with respondent that certain evidence admitted at his trial would not have been admitted in a separate trial for murder, but it did not expressly say so, nor did it refer to any Ohio authorities. *Mathews* v. *Marshall*, 754 F. 2d, at 162. The State submits that under Ohio law, conduct of a defendant tending to show either "his motive or intent," or his "scheme, plan or system," is admissible, "notwithstanding that such proof may show or tend to show the commission of another crime by the defendant." Ohio Rev. Code Ann. § 2945.59 (1982).[7] See generally *State* v. *Moorehead*, 24 Ohio St. 2d 166, 169, 265 N. E. 2d 551, 553 (1970). We normally accept a court of appeals' view of state law, but if this case turns on the admissibility of the challenged evidence in a separate trial for murder, the issue deserves a more thorough consideration by the lower court.

Finally, the court's observation that the admission of questionable evidence "may have prejudiced the jury" falls far short of a considered conclusion that if the evidence at issue was not before the jury in a separate trial for murder, there is a reasonable probability that respondent would not have been convicted.

Because the Court of Appeals' legal and factual basis for ordering the writ of habeas corpus to issue was seriously flawed, its judgment is reversed, and the case is remanded to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN, with whom JUSTICE POWELL joins, concurring in the judgment.

To remedy the jeopardy-barred prosecution and conviction of respondent James Michael Mathews for aggravated murder, the Ohio appellate court modified the conviction to one for the lesser included offense of murder, which was not jeopardy barred. The United States Court of Appeals for the Sixth Circuit held this remedy constitutionally insufficient because there was a "reasonable possibility" that the presence of the aggravated-murder charge prejudiced respondent's defense against the charge of murder. I think the Court of Appeals applied the right standard but reached the wrong result. Accordingly, I concur in today's judgment but do not join the Court's opinion.

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[7] Ohio Rev. Code Ann. § 2945.59 (1982) provides as follows:

"In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant."

Similarly, Ohio Rule of Evidence 404(b) states:

"(B) *Other crimes, wrongs or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

I

Respondent concedes that after he pleaded guilty to armed robbery Ohio could have tried him for murder without violating the Double Jeopardy Clause. Disagreeing with the Court of Appeals, however, he contends that the presence of the jeopardy-barred charge of aggravated murder in his subsequent trial *automatically* rendered unconstitutional any conviction resulting from that trial. The Court correctly points out that this position cannot be reconciled with the terms of the judgment in *Benton* v. *Maryland*, 395 U. S. 784 (1969). See *ante*, at 246. Moreover, respondent's primary argument for his position is unconvincing. He asserts that modifying his conviction from aggravated murder down to simple murder cannot possibly cure the violation, because the trial itself constituted the violation. The Double Jeopardy Clause, however, did not prohibit Ohio from holding a trial, only from seeking a conviction for aggravated murder. (It also barred the State from *obtaining* a conviction for aggravated murder, but the violation of that prohibition was remedied by the Ohio appellate court's modification of the judgment.) The error, then, was not that the trial was held, but that it was improperly broad. The prosecution did something it was not allowed to do: it tried respondent for aggravated murder in addition to simple murder. It is true that the prosecutorial conduct at issue is prohibited not simply for its potential effect on the trial's outcome, but also for the ordeal through which it put the defendant. As a consequence, it is also true that reducing respondent's sentence does not make him "whole" for the violation: it does not compensate him, for example, for any mental anguish inflicted upon him by the prosecution for the aggravated offense. See *Price* v. *Georgia*, 398 U. S. 323, 331, and n. 10 (1970). But it hardly follows from these considerations that the appropriate remedy must always be to set aside the entire conviction and have yet another trial, particularly since one of the purposes of the Double Jeopardy Clause is to promote finality by avoiding multiple trials for the same offense.

Accordingly, the Court of Appeals held that respondent was entitled to a new trial on the murder charge only if he demonstrated a "'reasonable possibility that he was prejudiced'" by the violation. *Mathews* v. *Marshall*, 754 F. 2d 158, 162 (CA6 1985), quoting *Graham* v. *Smith*, 602 F. 2d 1078, 1083 (CA2), cert. denied, 444 U. S. 995 (1979). The majority here now rejects that standard and holds that a defendant must demonstrate "a reliable inference of prejudice." *Ante*, at 246. This means, the majority explains, that respondent must show that without the error "there is a reasonable *probability*" that he would not have been convicted of murder. *Ibid.* (emphasis added). In yet a third formulation of its standard, the Court announces: "To prevail in a case like this, the defendant must show that, but for the improper inclusion of the jeopardy-barred charge, the result of the proceeding probably would have been different." *Ante*, at 247. To the extent that these standards differ from the "reasonable possibility" test applied by the Court of Appeals, they are, in my view, unprecedented and inappropriate.

II

The Court starts out on the wrong foot by asserting that "this is not a 'harmless error' case." *Ante*, at 244–245. Fundamentally, this *is* a "harmless error" case. Ohio concedes that it violated the Double Jeopardy Clause. To say that the remedy imposed by the state courts was constitutionally adequate is simply to say that the State's acknowledged transgression may be deemed harmless with respect to respondent's conviction for the lesser included offense. In *Chapman* v. *California*, 386 U. S. 18 (1967), this Court rejected the argument that no constitutional violation can ever be harmless. Some constitutional rights, of course, are "so basic to a fair trial" that their denial automatically requires reversal, *id.*, at 23, but I agree with the Court that this category does not include double jeopardy violations of the sort involved here when the ultimate conviction is not for a jeopardy-barred offense. Under *Chapman*, therefore, respondent's conviction for simple murder may be sustained if the State shows "beyond a reasonable doubt" that its error did not contribute to the conviction. *Id.*, at 24; see also, *e. g.*, *United States* v. *Hasting*, 461 U. S. 499, 511 (1983). As was noted in *Chapman*, the "harmless . . . beyond a reasonable doubt" standard is essentially the same as a requirement of reversal whenever there is a "reasonable possibility" that the error contributed to the conviction. 386 U. S., at 23–24.

The "reasonable possibility" standard originated in *Fahy* v. *Connecticut*, 375 U. S. 85 (1963), where it was applied to the improper introduction of illegally seized evidence. Less than two years prior to this Court's decision in *Chapman*, the Court of Appeals for the Second Circuit persuasively demonstrated that the *Fahy* standard was equally applicable to situations of the kind involved here, *i. e.*, jeopardy-barred prosecutions that ultimately result in convictions on lesser included charges that are not barred. See *United States ex rel. Hetenyi* v. *Wilkins*, 348 F. 2d 844 (1965), cert. denied *sub nom. Mancusi* v. *Hetenyi*, 383 U. S. 913 (1966). Hetenyi was charged by the State with first-degree murder but convicted only of second-degree murder, a lesser included offense. After his conviction was overturned on appeal, he again was prosecuted for first-degree murder, and ultimately convicted once more only of second-degree murder.[1] Writing for the Court of Appeals, then-Judge Marshall noted that the Constitution forbade the reprosecution of Hetenyi for an offense of which he had been impliedly acquitted in the first trial, but that the State constitutionally could have prosecuted Hetenyi again for second-degree murder. Nonetheless, the Court of Appeals invalidated Hetenyi's reconviction for the lesser offense, because there was a "*reasonable possibility* that he was prejudiced" by the fact that he was charged with first-degree murder. 348 F. 2d, at 864 (emphasis in original). "For example," Judge Marshall explained, "it is entirely possible that without the inclusion of the first degree murder charge, the jury, reflecting a not unfamiliar desire to compromise might have returned a guilty verdict on the first degree manslaughter charge," a lesser included offense of second-degree murder. *Id.*, at 866. The court refused to apply a more lenient test for harmless error, noting:

> "The ends of justice would not be served by requiring a factual determination that the accused was actually prejudiced . . . by being prosecuted for and charged with first degree murder, nor would the ends of justice be served by insisting upon a quantitative measurement of that prejudice. The energies and resources consumed by such inquiry would be staggering and the attainable level of certainty most unsatisfactory." *Id.*, at 864.

This Court relied on *Hetenyi* in *Price* v. *Georgia*, 398 U. S. 323 (1970), a case with similar facts. Price was tried for murder and found guilty of manslaughter. His conviction was overturned on appeal, he was retried for murder, and he again was found guilty of manslaughter. This Court held that the reprosecution for murder was barred on double jeopardy grounds, and rejected the State's argument that the error was rendered harmless by the fact that the second jury convicted Price only of the unbarred offense. Citing *Hetenyi*, the Court noted that "we cannot determine whether or not the murder charge against petitioner induced the jury to find him guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence." 398 U. S., at 331. The Court did not explicitly employ the "reasonable possibility" standard, but it observed: "The Double Jeopardy Clause . . . is cast in terms of the risk or hazard of trial and conviction, not of the ultimate legal consequence of the verdict. To be charged and to be subjected to a second trial for first-degree murder is an ordeal not to be viewed lightly." *Ibid.* The Court certainly gave no indication that it would consider the error harmless unless Price could show that "but for the improper inclusion of the jeopardy-barred charge, the result of the proceeding probably would have been different." See *ante*, at 247.[2]

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[1] Hetenyi was actually tried three times, each time for first-degree murder. In the second trial he was convicted of that offense, but the second conviction, like the first, was reversed on appeal on grounds other than double jeopardy. The third trial resulted in a conviction for second-degree murder.

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[2] Since *Price*, three Courts of Appeals have reviewed whether a double jeopardy violation was adequately remedied by modifying the jeopardy-barred conviction to one for a lesser included offense that was not jeopardy-barred; like the Court of Appeals for the Sixth Circuit in this case, each of the other two courts has followed *Hetenyi*. In *Graham* v. *Smith*, 602 F. 2d 1078 (CA2), cert. denied, 444 U. S. 995 (1979), the court addressed a situation similar to the one involved here. Graham's conviction for second-degree murder had been reduced on appeal to manslaughter. The modified conviction was then set aside on federal habeas, and the State successfully retried Graham for second-degree murder. Recognizing the double jeopardy violation, a state appellate court reduced the new conviction to manslaughter. This remedy was judged insufficient by the Court of Appeals because Graham's testimony at the second trial resulted in the introduction of extremely damaging impeachment evidence, and he claimed that he might not have testified had the State charged only manslaughter. The Court of Appeals found this claim doubtful but sufficiently plausible to

The Court today offers virtually no explanation for departing from *Chapman* and *Fahy* in favor of a more lenient approach. It cites no support at all for the "reliable inference" and "probably would have been different" formulations of the new test it announces. In support of the "reasonable probability" formulation, the Court refers to *Strickland* v. *Washington*, 466 U. S. 668 (1984), which used the same words but did not concern the adequacy of a proffered remedy for an acknowledged constitutional violation. The question in *Strickland* was whether there had been a constitutional violation in the first place. *Id.*, at 691–692. We held that a professionally unreasonable mistake by defense counsel constitutes ineffective assistance of counsel under the Sixth Amendment only if in retrospect there is a "reasonable probability" that the mistake altered the verdict—that is, "a probability sufficient to undermine confidence in the outcome." *Id.*, at 694; cf. *United States* v. *Bagley*, 473 U. S. 667 (1985) (prosecutor's failure to disclose evidence favorable to the accused violates due process where there is a "reasonable probability" that disclosure would have affected the outcome).[3] In this case, however, it is common ground that

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create a "'*reasonable possibility* that [Graham] was prejudiced.'" 602 F. 2d, at 1083, quoting *Hetenyi*, 348 F. 2d, at 864.

The Court of Appeals for the Fifth Circuit took a similar approach in *Tapp* v. *Lucas*, 658 F. 2d 383 (1981), cert. denied, 456 U. S. 972 (1982), which also involved facts resembling those here. Tapp was prosecuted for murder and convicted of manslaughter. The conviction was set aside, and he was retried for murder, this time with success. To remedy the double jeopardy violation, the State Supreme Court reduced the second conviction to manslaughter. Citing *Graham* v. *Smith*, the Court of Appeals upheld this remedy as "a common sense solution to the problem of avoiding yet another trial." 658 F. 2d, at 386. The court distinguished *Price* on the ground that "the *possibility* of prejudicial jury compromise is simply absent from this case." *Ibid.* (emphasis added).

[3] As in *Strickland*, the Court today defines a "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." *Ante*, at 247; *Strickland*, 466 U. S., at 694. In *Strickland*, however, we specifically refused to require a showing "that counsel's deficient conduct *more*

respondent's rights under the Double Jeopardy Clause were violated when Ohio tried him for aggravated murder. The question is not whether Ohio has also violated the Sixth Amendment or the Due Process Clause. The question is whether the State has sufficiently contained the damage from its *acknowledged* violation of the Double Jeopardy Clause, or whether that transgression taints even the conviction for simple murder. At issue is the extent to which the law will tolerate a conviction that may have been obtained through abridgment of a defendant's constitutional rights. Once it is established that the State has violated the Constitution in the course of a prosecution, the proceedings lose whatever presumption of regularity they formerly enjoyed, and the State properly bears a heavy burden in arguing that the result should nonetheless be treated as valid.

By ruling, despite *Chapman*, that a defendant in a case such as this must show more than a reasonable possibility of prejudice to invalidate the conviction, the Court makes double jeopardy violations more readily excusable than any other kind of constitutional error. For me, that makes little sense. Violations of the Double Jeopardy Clause are no less serious than violations of other constitutional protections. Their excusability should be judged by the same standard. The Court offers no real explanation for the special leniency it announces today, and there is none.

III

The proper question in this case is thus whether Ohio has shown beyond a reasonable doubt that the aggravated-murder charge did not contribute to respondent's conviction for simple murder. Under *Chapman* and *Fahy* this means

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likely than not altered the outcome in the case." *Id.*, at 693 (emphasis added). The Court's reliance on some of the language of *Strickland* therefore renders particularly puzzling its wholly unprecedented demand one paragraph later that the respondent here demonstrate that without the jeopardy-barred charge "the result of the proceeding probably would have been different." *Ante*, at 247.

that the State must convincingly disprove any reasonable possibility that the greater charge prejudiced respondent's defense against the lesser. With most errors, the prejudice to be feared is so obvious that there is no need for the defendant to spell it out. When illegally obtained evidence is introduced, or when the prosecutor makes forbidden remarks, it is understood that the danger is that the illegal evidence or the remarks will influence the jury. In this case, however, there is no obvious way in which the defendant could have been prejudiced. The conviction for the jeopardy-barred offense was reduced to one for an unbarred, lesser included offense. There is no possibility of a compromise verdict, as in *Hetenyi* or *Price*, because here the jury convicted for the greater offense charged. Nor is there any reason to believe that evidence regarding the robbery, admitted to prove the aggravating factor in respondent's trial, would not have been admitted in a trial for simple murder. Like the Federal Rules of Evidence, Ohio's evidence code allows the introduction of evidence of other crimes to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ohio Rule Evid. 404(B); see also Fed. Rule Evid. 404(b). The murder in this case was committed while in flight from the bank robbery. The State's theory is that respondent murdered his accomplice in order to silence him so that respondent could escape prosecution for the robbery and, he hoped, return later to pick up the stolen money he had hidden. There consequently is no apparent reason why evidence of the robbery would not have been admissible to show motive and opportunity for the murder.

Given all this, respondent is obligated to spell out with some specificity how the trial might have gone better for him had the State charged only simple murder. He has not done so; instead, he has simply speculated that all sorts of things might have been different. That is not enough to prevent this Court from "declar[ing] a belief that [the error] was harmless beyond a reasonable doubt." *Chapman*, 386 U. S., at 24. If it were, the remand in *Benton* v. *Maryland*, 395 U. S. 784 (1969), would have been inappropriate: the Court there simply would have vacated the burglary conviction, because there was no telling what would have happened had the defendant not been forced to defend himself against the larceny charge. Perhaps different trial tactics would have been tried; perhaps defense counsel would have prepared more fully on the burglary charge. Indeed, if abstract speculations of this sort sufficed to create a "reasonable doubt" that an error was harmless, it is difficult to see how any constitutional error ever would qualify.

I therefore concur in the Court's judgment, although I see no justification for departing from the traditional and established standards for deciding questions of this kind.

JUSTICE BRENNAN, dissenting.

Both the charge for aggravated robbery, to which respondent pleaded guilty, and the subsequent charge for aggravated murder arose from the same criminal transaction or episode. In those circumstances, Ohio's prosecution for aggravated murder, and the Ohio Court of Appeals' subsequent reduction of that conviction to simple murder, in my view, violated the prohibition of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment, *Benton* v. *Maryland*, 395 U. S. 784 (1969), that no person shall be subject for the same offense to be twice put in jeopardy. I adhere to my view that the Double Jeopardy Clause requires that except in extremely limited circumstances not present here, "all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction" be prosecuted in one proceeding. *Ashe* v. *Swenson*, 397 U. S. 436, 453–454 (1970) (BRENNAN, J., concurring). See, *e. g.*, *Brooks* v. *Oklahoma*, 456 U. S. 999 (1982) (BRENNAN, J., dissenting); *Snell* v. *United States*, 450 U. S. 957 (1981) (BRENNAN, J., dissenting); *Werneth* v. *Idaho*, 449 U. S. 1129 (1981) (BRENNAN, J., dissenting); *Thompson* v. *Oklahoma*,

429 U. S. 1053 (1977) (BRENNAN, J., dissenting). Accordingly, I would affirm the judgment below reversing the District Court, with directions to the Court of Appeals to remand the case to the District Court with instructions to issue the writ.

However, even on the view that a second prosecution is permissible under the circumstances of this case, I would agree with JUSTICE BLACKMUN for the reasons stated in his opinion concurring in the judgment, *ante*, p. 248, that respondent is entitled to a new trial if he could demonstrate a "reasonable possibility" that he was prejudiced. *Ante*, at 255–256. I also agree with JUSTICE MARSHALL, *post*, at 259, that the Court of Appeals' finding that this standard has been met should be sustained.

JUSTICE MARSHALL, dissenting.

For substantially the reasons stated in Parts I and II of JUSTICE BLACKMUN's thoughtful concurrence, I believe that the Court of Appeals was correct to conclude that respondent was entitled to a new trial if he could demonstrate a "'reasonable possibility that he was prejudiced'" by the double jeopardy violation, *Mathews* v. *Marshall*, 754 F. 2d 158, 162 (CA6 1985) (quoting *Graham* v. *Smith*, 602 F. 2d 1078, 1083 (CA2 1979)). This standard is consistent with the approach this Court has uniformly taken when constitutional violations do not require automatic reversal, see *ante*, at 250–253, and is justified by the difficulties that a defendant wishing to show even the probability of actual prejudice must face.

> "There [can] never be any certainty as to whether the jury was actually influenced by the unconstitutionally broad scope of the reprosecution or whether the accused's defense strategy was impaired by this scope of the charge, even if there were a most sensitive examination of the entire trial record and a more suspect and controversial inquest of the jurors still alive and available." *United States ex rel. Hetenyi* v. *Wilkins*, 348 F.

2d 844, 864 (CA2 1965), cert. denied *sub nom. Mancusi* v. *Hetenyi*, 383 U. S. 913 (1966).

The mere absence of any danger in a particular case that the bringing of a jeopardy-barred charge resulted in a compromise verdict, see, *e. g.*, *Price* v. *Georgia*, 398 U. S. 323 (1970); *Hetenyi*, *supra*, is no reason for adopting a different standard for determining whether a defendant is entitled to a new trial. By impermissibly expanding the scope of the prosecution, the double jeopardy violation may have exposed defendant to serious dangers of another sort.

One of the dangers faced by respondent here was that evidence that would not have been admitted (indeed, might not have even been offered) had he been tried for simple murder came in because the prosecution had brought the jeopardy-barred charge of aggravated murder. The Court of Appeals reversed respondent's conviction because it found that such otherwise inadmissible evidence had been admitted and "may have prejudiced the jury with regard to its findings as to intent and to the act itself." 754 F. 2d, at 162. Unlike JUSTICE BLACKMUN, I see no reason why the Court of Appeals should be required to reconsider its conclusion that respondent was so prejudiced. On such a question of state evidentiary law, "the federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues," *Butner* v. *United States*, 440 U. S. 48, 58 (1979). And, in the absence of any indication that the Court of Appeals gave anything less than its full attention to the question whether certain evidence that in fact came in would have been inadmissible in a simple murder trial, I believe that the majority's decision to remand the case for a "more thorough consideration by the lower court" of this issue, *ante*, at 248, is disingenuous at best.

FISHER ET AL. *v.* CITY OF BERKELEY, CALIFORNIA, ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA

No. 84–1538. Argued November 12, 1985—Decided February 26, 1986

A Berkeley, California, ordinance, enacted pursuant to popular initiative, imposes rent ceilings on residential real property in the city. The rent ceilings are under the control of a Rent Stabilization Board. Appellant landlords brought suit in California Superior Court challenging the constitutionality of the ordinance on Fourteenth Amendment grounds and seeking declaratory and injunctive relief. The Superior Court upheld the ordinance but was reversed by the California Court of Appeal. In the meantime, based on the intervening decision in *Community Communications Co.* v. *Boulder*, 455 U. S. 40, the question arose as to whether the ordinance was unconstitutional because it was pre-empted by the Sherman Act. The California Supreme Court held that there was no conflict between the ordinance and the Sherman Act.

Held: The ordinance is not unconstitutional as being pre-empted by the Sherman Act. Pp. 264–270.

(a) The rent ceilings established by the ordinance and maintained by the Rent Stabilization Board were unilaterally imposed by the city upon landlords to the exclusion of private control. Thus, the rent ceilings lack the element of concerted action needed before they can be characterized as a *per se* violation of § 1 of the Sherman Act. A restraint imposed unilaterally by government does not become concerted action within the meaning of § 1 simply because it has a coercive effect upon parties who must obey the law. And the mere fact that all competing landlords must comply with the ordinance is not enough to establish a conspiracy among landlords. Pp. 265–267.

(b) While the ordinance gives tenants some power to trigger its enforcement, it places complete control over maximum rent levels exclusively in the Rent Stabilization Board's hands. *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, and *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97, distinguished. Pp. 267–270.

37 Cal. 3d 644, 693 P. 2d 261, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. POWELL, J., filed an opinion concurring in the judgment, *post*, p. 270. BRENNAN, J., filed a dissenting opinion, *post*, p. 274.

Jon D. Smock argued the cause for appellants. On the briefs were *James R. Parrinello*, *John E. Mueller*, and *Peter J. Donnici.*

Laurence H. Tribe argued the cause for appellees. With him on the brief were *Kathleen M. Sullivan*, *Myron Moskovitz*, and *Manuela Albuquerque.**

JUSTICE MARSHALL delivered the opinion of the Court.

The question presented here is whether a rent control ordinance enacted by a municipality pursuant to popular initiative is unconstitutional because pre-empted by the Sherman Act.

I

In June 1980, the electorate of the city of Berkeley, California, enacted an initiative entitled "Ordinance 5261-N. S., Rent Stabilization and Eviction for Good Cause Ordinance"

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*Briefs of *amici curiae* urging reversal were filed for the California Housing Council, Inc., by *Carla A. Hills* and *William C. Kelly, Jr.*; for the Mid-America Legal Foundation by *John M. Cannon*, *Susan W. Wanat*, and *Ann Plunkett Sheldon;* for the Pacific Legal Foundation et al. by *Ronald A. Zumbrun* and *Robert K. Best;* and for the Washington Legal Foundation by *Daniel J. Popeo* and *Paul D. Kamenar.*

Briefs of *amici curiae* urging affirmance were filed for the State of New Jersey Department of the Public Advocate by *Richard E. Shapiro;* and for the United States Conference of Mayors et al. by *Benna Ruth Solomon*, *Joyce Holmes Benjamin*, *Stephen Chapple*, and *Cynthia M. Pols.*

Briefs of *amici curiae* were filed for the City and County of San Francisco by *George P. Agnost* and *Burk E. Delventhal;* for the City of Santa Monica et al. by *Robert M. Myers*, *Stephen S. Stark*, *Karl M. Manheim*, *Raymond E. Ott*, and *K. D. Lyders;* for the Berkeley Property Owners' Association by *Thomas A. Seaton;* for the California Apartment Association by *Jon D. Smock*, *Wilbur H. Haines III*, and *Jeffrey J. Gale;* for the Coalition for Competition in Apartment Rentals by *E. Barrett Prettyman, Jr.*, and *Elwood S. Kendrick;* and for the National Apartment Association et al. by *Jon D. Smock.*

(hereafter Ordinance). Section 3 of the Ordinance stated the measure's purposes:[1]

> "The purposes of this Ordinance are to regulate residential rent increases in the City of Berkeley and to protect tenants from unwarranted rent increases and arbitrary, discriminatory, or retaliatory evictions, in order to help maintain the diversity of the Berkeley community and to ensure compliance with legal obligations relating to the rental of housing. This legislation is designed to address the City of Berkeley's housing crisis, preserve the public peace, health and safety, and advance the housing policies of the City with regard to low and fixed income persons, minorities, students, handicapped, and the aged." App. to Juris. Statement A-111.

To accomplish these goals, the Ordinance places strict rent controls on all real property that "is being rented or is available for rent for residential use in whole or in part," § 5, *id.*, at A-113. Excepted are government-owned units, transient units, cooperatives, hospitals, certain small owner-occupied buildings, and all newly constructed buildings. For the remaining units, numbering approximately 23,000, 37 Cal. 3d 644, 678, 693 P. 2d 261, 288 (1984), the Ordinance establishes a base rent ceiling reflecting the rents in effect at the end of May 1980. A landlord may raise his rents from these levels only pursuant to an annual general adjustment of rent ceilings by a Rent Stabilization Board of appointed commissioners or after he is successful in petitioning the Board for an individual adjustment. A landlord who fails to register with the Board units covered by the Ordinance or who fails to adhere to the maximum allowable rent set under the Ordinance may be fined by the Board, sued by his tenants, or have rent legally withheld from him. If his violations are willful, he may face criminal penalties.

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[1] In 1982, while this case was pending in the California Court of Appeal, the Berkeley electorate enacted the "Tenants' Rights Amendments Act of 1982," revising certain sections of the 1980 Ordinance. Like the California Supreme Court, we review the Ordinance as amended, see 37 Cal. 3d 644, 654, n. 2, 693 P. 2d 261, 270, n. 2 (1984); all reference herein will therefore be to the 1982 version of the Ordinance.

Shortly after the passage of the initiative, appellants, a group of landlords owning rental property in Berkeley, brought this suit in California Superior Court, claiming, *inter alia*, that the Ordinance violates their rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and seeking declaratory and injunctive relief. The Superior Court upheld the Ordinance on its face, but was reversed by the Court of Appeal. While that appeal was pending, however, this Court's decision in *Community Communications Co.* v. *Boulder*, 455 U. S. 40 (1982), led certain *amici* to raise the question whether the Ordinance was unconstitutional because pre-empted by the federal antitrust laws. When the California Supreme Court heard the appeal from the Court of Appeal's decision, it therefore chose to consider plaintiffs' pre-emption claim along with their Fourteenth Amendment challenge.

Although fully briefed on the question whether the Berkeley Ordinance constitutes state action exempt from antitrust scrutiny under the standard established in *Boulder*, *supra*, the California Supreme Court noted that consideration of this issue would become necessary only were there to be "'truly a conflict between the Sherman Act and the challenged regulatory scheme,'" 37 Cal. 3d, at 660, 693 P. 2d, at 275 (quoting *First American Title Co.* v. *South Dakota Land Title Assn.*, 714 F. 2d 1439, 1452 (CA8 1983), cert. denied, 464 U. S. 1042 (1984)). Such a conflict would exist, the Supreme Court concluded, only if the Ordinance on its face mandated conduct prohibited by either § 1 or § 2 of the Sherman Act. See *Rice* v. *Norman Williams Co.*, 458 U. S. 654, 661 (1982). After reviewing the two "traditional standards" that have consistently been used to determine whether conduct violates § 1 of the Sherman Act—the *per se* rules and the rule of reason, see

National Society of Professional Engineers v. *United States*, 435 U. S. 679, 692 (1978)—the court concluded that both standards, with their exclusive focus on competition and concern for the selfish motives of private actors, failed to give due deference to a municipality's legitimate interest in promoting public health, safety, and welfare. 37 Cal. 3d, at 667–673, 693 P. 2d, at 280–285. The Supreme Court therefore found both standards inappropriate and proceeded to apply a standard of its own devising, based upon this Court's Commerce Clause cases. Applying this test, the court found no conflict between the Ordinance and either § 1 or § 2 of the Sherman Act.

We noted probable jurisdiction limited to the antitrust pre-emption question, 471 U. S. 1124 (1985), and now affirm, although on grounds different from those relied on by the California Supreme Court. While that court was correct in noting that consideration of state action is not necessary unless an actual conflict with the antitrust laws is established, we find traditional antitrust analysis adequate to resolve the issue presented here.

II

We begin by noting that appellants make no claim under either § 4 or § 16 of the Clayton Act, 15 U. S. C. §§ 15 and 26, that the process by which the Rent Stabilization Ordinance was passed renders the Ordinance the product of an illegal "contract, combination . . . , or conspiracy." Appellants instead claim that, regardless of the manner of its enactment, the regulatory scheme established by the Ordinance, on its face, conflicts with the Sherman Act and therefore is pre-empted.

Recognizing that the function of government may often be to tamper with free markets, correcting their failures and aiding their victims, this Court noted in *Rice* v. *Norman Williams Co.*, *supra*, that a "state statute is not pre-empted by the federal antitrust laws simply because the state scheme may have an anticompetitive effect," *id.*, at 659. See *Exxon*

Corp. v. *Governor of Maryland,* 437 U. S. 117, 133 (1978). We have therefore held that a state statute should be struck down on pre-emption grounds "only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute." 458 U. S., at 661.

While *Rice* involved a state statute rather than a municipal ordinance, the rule it established does not distinguish between the two. As in other pre-emption cases, the analysis is the same for the acts of both levels of government. See, *e. g., White* v. *Massachusetts Council of Construction Employers, Inc.,* 460 U. S. 204 (1983). Only where legislation is found to conflict "irreconcilably" with the antitrust laws, *Rice, supra,* at 659, does the level of government responsible for its enactment become important. Legislation that would otherwise be pre-empted under *Rice* may nonetheless survive if it is found to be state action immune from antitrust scrutiny under *Parker* v. *Brown,* 317 U. S. 341 (1943). The ultimate source of that immunity can be only the State, not its subdivisions. See *Community Communications Co.* v. *Boulder, supra,* at 50–51; *Lafayette* v. *Louisiana Power & Light Co.,* 435 U. S. 389, 412–413 (1978) (opinion of BRENNAN, J.).

A

Appellants argue that Berkeley's Ordinance is pre-empted under *Rice* because it imposes rent ceilings across the entire rental market for residential units. Such a regime, they contend, clearly falls within the *per se* rule against price fixing, a rule that has been one of the settled points of antitrust enforcement since the earliest days of the Sherman Act, see *Arizona* v. *Maricopa County Medical Society,* 457 U. S. 332, 344–348 (1982); *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 218 (1940). That the prices set here are ceilings rather than floors and that the public interest has been invoked to justify this stabilization should not, appellants argue, save Berkeley's regulatory scheme from condemnation under the *per se* rule.

Certainly there is this much truth to appellants' argument: Had the owners of residential rental property in Berkeley voluntarily banded together to stabilize rents in the city, their activities would not be saved from antitrust attack by claims that they had set reasonable prices out of solicitude for the welfare of their tenants. See *National Society of Professional Engineers* v. *United States*, *supra*, at 695; *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290 (1897). Moreover, it cannot be denied that Berkeley's Ordinance will affect the residential housing rental market in much the same way as would the philanthropic activities of this hypothetical trade association. What distinguishes the operation of Berkeley's Ordinance from the activities of a benevolent landlords' cartel is not that the Ordinance will necessarily have a different economic effect, but that the rent ceilings imposed by the Ordinance and maintained by the Rent Stabilization Board have been unilaterally imposed by government upon landlords to the exclusion of private control.

The distinction between unilateral and concerted action is critical here. Adhering to the language of § 1, this Court has always limited the reach of that provision to "unreasonable restraints of trade effected by a 'contract, combination . . . , or conspiracy' between *separate* entities." *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U. S. 752, 768 (1984) (emphasis in original). We have therefore deemed it "of considerable importance" that independent activity by a single entity be distinguished from a concerted effort by more than one entity to fix prices or otherwise restrain trade, *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U. S. 752, 763 (1984). Even where a single firm's restraints directly affect prices and have the same economic effect as concerted action might have, there can be no liability under § 1 in the absence of agreement. *Id.*, at 760–761; *United States* v. *Parke, Davis*

& Co., 362 U. S. 29, 44 (1960). Thus, if the Berkeley Ordinance stabilizes rents without this element of concerted action, the program it establishes cannot run afoul of § 1.

Recognizing this concerted-action requirement, appellants argue that the Ordinance "forms a combination between [the city of Berkeley and its officials], on the one hand, and the property owners on the other. It also creates a horizontal combination among the landlords." Reply Brief for Appellants 10, n. 7. In so arguing, appellants misconstrue the concerted-action requirement of § 1. A restraint imposed unilaterally by government does not become concerted action within the meaning of the statute simply because it has a coercive effect upon parties who must obey the law. The ordinary relationship between the government and those who must obey its regulatory commands whether they wish to or not is not enough to establish a conspiracy. Similarly, the mere fact that all competing property owners must comply with the same provisions of the Ordinance is not enough to establish a conspiracy among landlords. Under Berkeley's Ordinance, control over the maximum rent levels of every affected residential unit has been unilaterally removed from the owners of those properties and given to the Rent Stabilization Board. While the Board may choose to respond to an individual landlord's petition for a special adjustment of a particular rent ceiling, it may decide not to. There is no meeting of the minds here. See *American Tobacco Co.* v. *United States*, 328 U. S. 781, 810 (1946), quoted in *Monsanto, supra,* at 764. The owners of residential property in Berkeley have no more freedom to resist the city's rent controls than they do to violate any other local ordinance enforced by substantial sanctions.

B

Not all restraints imposed upon private actors by government units necessarily constitute unilateral action outside the purview of § 1. Certain restraints may be characterized as "hybrid," in that nonmarket mechanisms merely enforce private marketing decisions. See *Rice* v. *Norman Williams Co.*, 458 U. S., at 665 (STEVENS, J., concurring in judgment). Where private actors are thus granted "a degree of private regulatory power," *id.*, at 666, n. 1, the regulatory scheme may be attacked under § 1. Indeed, this Court has twice found such hybrid restraints to violate the Sherman Act. See *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384 (1951); *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97 (1980).

In *Schwegmann*, a Louisiana statute authorized a distributor to enforce agreements fixing minimum retail prices not only against parties to such contracts, but also against retailers who sold the distributor's products without having agreed to the price restrictions. After finding that the statute went far beyond the now-repealed Miller-Tydings Act, which offered a limited antitrust exemption to certain "'contracts or agreements prescribing minimum prices for the resale'" of specified commodities, the Court held that two liquor distributors had violated § 1 when they attempted to hold a retailer to the price-fixing terms of a contract it had refused to sign. In so holding, the Court noted that "when a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids." 341 U.S, at 389. However, under the Louisiana statute, both the selection of minimum price levels and the exclusive power to enforce those levels were left to the discretion of distributors. While the petitioner-retailer in that case may have been legally required to adhere to the levels so selected, the involvement of his suppliers in setting those prices made it impossible to characterize the regulation as unilateral action by the State of Louisiana.

The trade restraint condemned in *Midcal* entailed a similar degree of free participation by private economic actors. That case presented an antitrust challenge to California's requirement that all wine producers, wholesalers, and rectifiers file fair trade contracts or price schedules with the State. If a wine producer did not set prices, wholesalers had to post a resale price schedule for that producer's brands. No state-licensed wine merchant could sell wine to a retailer at other than those prices. 445 U. S., at 99. The Court found: "California's system for wine pricing plainly constitutes resale price maintainance in violation of the Sherman Act . . . . The wine producer holds the power to prevent price competition by dictating the prices charged by wholesalers." *Id.*, at 103. Here again, the mere existence of legal compulsion did not turn California's scheme into unilateral action by the State. The Court noted: "The State has no direct control over wine prices, and it does not review the reasonableness of the prices set by wine dealers." *Id.*, at 100.

The hybrid restraints condemned in *Schwegmann* and *Midcal* were thus quite different from the pure regulatory scheme imposed by Berkeley's Ordinance. While the Ordinance does give tenants—certainly a group of interested private parties—some power to trigger the enforcement of its provisions, it places complete control over maximum rent levels exclusively in the hands of the Rent Stabilization Board. Not just the controls themselves but also the rent ceilings they mandate have been unilaterally imposed on the landlords by the city.

C

There may be cases in which what appears to be a state- or municipality-administered price stabilization scheme is really a private price-fixing conspiracy, concealed under a "gauzy cloak of state involvement," *Midcal*, *supra*, at 106. This might occur even where prices are ostensibly under the absolute control of government officials. However, we have been given no indication that such corruption has tainted the rent controls imposed by Berkeley's Ordinance. Adopted by popular initiative, the Ordinance can hardly be viewed as a cloak for any conspiracy among landlords or between the landlords and the municipality. Berkeley's landlords have simply been deprived of the power freely to raise their rents. That is why they are here. And that is why their role in the stabilization program does not alter the restraint's unilateral nature.[2]

III

Because under settled principles of antitrust law, the rent controls established by Berkeley's Ordinance lack the element of concerted action needed before they can be characterized as a *per se* violation of § 1 of the Sherman Act, we cannot say that the Ordinance is facially inconsistent with the federal antitrust laws. See *Rice* v. *Norman Williams Co.*, *supra*, at 661. We therefore need not address whether, even if the controls were to mandate § 1 violations, they would be exempt under the state-action doctrine from antitrust scrutiny. See *Hallie* v. *Eau Claire*, 471 U. S. 34 (1985).

The judgment of the California Supreme Court is

Affirmed.

JUSTICE POWELL, concurring in the judgment.

The Court today reaches out to decide a difficult preemption question when a straightforward and well-settled ground for decision is available. In my view, Berkeley's Ordinance plainly falls within the "state action" exemption of *Parker* v. *Brown*, 317 U. S. 341 (1943), and its progeny. I therefore concur in the judgment, but on grounds different from those discussed in the Court's opinion.

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[2] Though they have not pressed the point with any vigor in this Court, appellants have suggested that Berkeley's rent controls constitute attempted monopolization because the city "is clearly engaged in the provision of housing in the public sector" and using the controls to depress the prices of residential properties as a prelude to taking them over. Tr. of Oral Arg. 14–15. As to this claim, we note only that the inquiry demanded by appellants' allegations goes beyond the scope of the facial challenge presented here. See *Rice* v. *Norman Williams Co.*, 458 U. S., at 661.

When a municipal government engages in anticompetitive activity pursuant to a clearly articulated state policy to displace competition with regulation, the "state action" exemption removes the conduct from the coverage of the antitrust laws. *Hallie* v. *Eau Claire*, 471 U. S. 34, 38–39 (1985); *Community Communications Co.* v. *Boulder*, 455 U. S. 40, 54 (1982). In *Hallie*, we found such a policy embodied in a state statute that "delegated to [municipalities] the express authority to take action that foreseeably will result in anticompetitive effects." 471 U. S., at 43. See also *Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 415 (1978) (opinion of BRENNAN, J.) ("[A]n adequate state mandate for anticompetitive activities . . . exists when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of'") (citation omitted). Thus, the question in this case is whether California has expressly delegated to Berkeley regulatory power that foreseeably would lead to the anticompetitive effects challenged by appellants.

The history of Berkeley's ordinance is illuminating. Prior to 1974, Article XI, § 3, of the California Constitution[1] required the state legislature to approve all changes in municipal charters. In 1972, in a citywide initiative, Berkeley's citizens approved a charter amendment authorizing rent control. This charter amendment effectively froze rents at 1971 levels, subject to individual adjustments by a popularly elected rent control board. *Birkenfeld* v. *City of Berkeley*, 17 Cal. 3d 129, 138, 550 P. 2d 1001, 1008 (1976). The California Legislature ratified the charter amendment on August 2, 1972, and the rent control plan went into effect. 1972 Cal. Stat. 3370. A group of landlords challenged the rent control plan on a number of constitutional and statutory grounds. In the ensuing litigation, the California Supreme Court invalidated the plan on the ground that it lacked procedural safeguards necessary to protect landlords from confiscatory rent ceilings.[2] *Birkenfeld, supra*, at 170–172, 550 P. 2d, at 1030–1032. In 1980, in another initiative, Berkeley's citizens adopted the ordinance at issue in this case. This Ordinance provided the procedural protections that the 1972 charter provision lacked, and it subsequently survived constitutional challenge in state court. 37 Cal. 3d 644, 679–691, 693 P. 2d 261, 289–298 (1984).

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[1] When Berkeley's charter amendment was passed in 1972, Article XI, § 3(a), of the California Constitution read:

"For its own government, a county or city may adopt a charter by majority vote of its electors voting on the question. The charter is effective when filed with the Secretary of State. A charter may be amended, revised, or repealed in the same manner. A charter, amendment, revision, or repeal thereof shall be published in the official state statutes. . . . The provisions of a charter are the law of the State and have the force and effect of legislative enactments."

This provision was construed to require that charter amendments be approved by concurrent resolution of both houses of the state legislature. *Birkenfeld* v. *City of Berkeley*, 17 Cal. 3d 129, 137, n. 2, 550 P. 2d 1001, 1007, n. 2 (1976).

The challenged Ordinance thus replaces a rent control plan that was expressly authorized by the state legislature. Under *Hallie*, a general grant of authority to regulate rents would have sufficed to exempt Berkeley's Ordinance from the antitrust laws. 471 U. S., at 42. It follows that the legislature's ratification of a particular rent control plan must also trigger the state-action exemption. See *ibid.*; *Boulder*, *supra*, at 55–56. The remaining issue is whether the authority granted in 1972 remains intact.

Appellants contend that it does not. First, appellants argue that the California Supreme Court's decision in *Birken-*

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[2] The 1972 charter provision permitted individual adjustments of the across-the-board rent ceiling only on a unit-by-unit basis, and only after a hearing on the particular unit whose rent was to be raised. The California Supreme Court found that this limitation "put the [rent control board] in a procedural strait jacket," and "unnecessarily preclude[d] reasonably prompt action" on meritorious petitions by landlords. *Birkenfeld, supra*, at 171, 172, 550 P. 2d, at 1031, 1032.

feld, invalidating the 1972 charter provision, effectively canceled the legislature's ratification of that provision. *Birkenfeld* did not, however, decide that rent control was bad policy, or that it was inconsistent with state law. See *Birkenfeld*, *supra*, at 159–164, 550 P. 2d, at 1023–1026 (finding that enacting a rent control plan was a permissible exercise of the city's police power); Note, 65 Calif. L. Rev. 304, 305 (1977) ("*Birkenfeld* offers California cities . . . the judicial equivalent of a rent control enabling act"). Rather, the decision stands only for the proposition that cities must couple rent control with procedures for adjusting rent ceilings to avoid fixing rents at confiscatory levels. 17 Cal. 3d, at 167–173, 550 P. 2d, at 1028–1033. *Birkenfeld* thus left Berkeley's basic power to impose rent controls unaffected.

Second, appellants contend that since 1972 the state legislature has declared its neutrality respecting a city's decision to control rents. See *Boulder*, *supra*, at 55 (clear articulation requirement is not satisfied "when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive"). This argument rests on the passage in 1980 of a comprehensive planning and zoning law, one provision of which states:

> "Nothing in this article shall be construed to be a grant of authority *or a repeal of any authority which may exist* of a local government to impose rent controls or restrictions on the sale of real property." Cal. Govt. Code Ann. § 65589(b) (West 1983) (emphasis added).

By its express terms this statute leaves intact cities' preexisting authority to adopt rent control provisions. For purposes of the clear articulation requirement, Berkeley's preexisting authority is defined by the legislature's ratification of the city's 1972 charter amendment.

For these reasons, I would find that Berkeley's Ordinance is exempt from the antitrust laws under our decisions in *Hallie* and *Boulder*. By ratifying Berkeley's charter amendment, the state legislature expressly authorized Berkeley to control rents. The State has not since rescinded that authorization. That is all we need decide in this case.

I therefore concur in the judgment, and express no view on the merits of the pre-emption issue decided by the Court.

JUSTICE BRENNAN, dissenting.

Since *Parker* v. *Brown*, 317 U. S. 341 (1943), the Court has wrestled with the question of the degree to which federal antitrust laws prohibit state and local governments from imposing anticompetitive restraints on trade. Laws which impose such restraints have been held to be exempt from antitrust scrutiny if they constitute action of the State itself in its sovereign capacity, or state-authorized municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy. See *Community Communications Co.* v. *Boulder*, 455 U. S. 40, 52 (1982). Today, the Court holds that a municipality's price-fixing scheme is not pre-empted by the federal antitrust laws whether or not the scheme is state-authorized, or furthers or implements a clearly articulated and affirmatively expressed state policy. Because today's decision discards over 40 years of carefully considered precedent, I respectfully dissent.

I

A

Berkeley's Rent Stabilization Ordinance (hereafter Ordinance) effectively fixes prices for rental units in the city of Berkeley. In *Rice* v. *Norman Williams Co.*, 458 U. S. 654, 661 (1982), we held that a state statute

> "may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a *per se* violation."

In this case, by declaring maximum prices landlords may charge, Berkeley's Ordinance irresistibly pressures landlords to fix prices for their rental units. Thus, the Ordinance "facially conflict[s] with the Sherman Act because it *mandate[s]* [price fixing], an activity that has long been regarded as a *per se* violation of the Sherman Act." *Id.*, at 659–660 (emphasis in original).

The Court recognizes that the Ordinance imposes anticompetitive restraints on trade, and that it has the same effect on the housing market as would a conspiracy by landlords to fix rental prices. *Ante*, at 266. Despite this, the Court holds that the Ordinance is not pre-empted by the Sherman Act because prices are fixed "unilaterally" by the city, rather than by "contract, combination, or conspiracy." I do not read our decisions necessarily to require proof of such concerted action as a prerequisite to a finding of pre-emption. Certainly, nothing we said in *Rice* supports such a narrow view of pre-emption.[1] Our other decisions have found statutes in conflict with the Sherman Act because they eliminated price competition in the relevant market.

In *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97 (1980), a wine wholesaler sought to enjoin enforcement of a California statute which effectively required it to sell wines at prices set by producers. The Court focused on the fact that the statute eliminated price competition, and held that the wine-pricing system constituted resale price maintenance in violation of the Sherman Act. The *Midcal* decision squarely controls the result here. Just as the statute challenged in *Midcal* compelled wine wholesalers to charge prices set by wine producers, Berkeley's Ordinance compels landlords to charge prices set by the city. The city "holds the power to prevent price competition by dictating the prices charged" by landlords. *Id.*, at 103. "[S]uch vertical control destroys horizontal competition as effectively as if [landlords] 'formed a combination and endeavored to establish the same restrictions . . . by agreement with each other.'" *Ibid.* (quoting *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373, 408 (1911)).

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[1] *Rice* held that a "state statute is not pre-empted by the federal antitrust laws simply because the state scheme might have an anticompetitive effect." 458 U. S., at 659. *Rice* involved a challenge to a California statute which effectively allowed liquor distillers to control distribution of their products in the State. The Court concluded that because such vertical *nonprice* restraints are not *per se* illegal under the Sherman Act, see *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36 (1977), the statute was not pre-empted. 458 U. S., at 661; see also *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117 (1978); *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U. S. 35 (1966). In contrast, Berkeley's Rent Stabilization Board fixes prices for rental units in the city. Unlike *nonprice* restraints, *price fixing* has traditionally been held to be *per se* illegal under the Sherman Act. See *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373 (1911).

Schwegmann Bros. v. *Calvert Distillers Corp.*, 341 U. S. 384 (1951), is also directly on point. In *Schwegmann*, a Louisiana statute authorized liquor distributors to enforce agreements fixing minimum retail prices on their products against retailers who had not agreed to the price restrictions. The Court held that the statutory scheme amounted to resale price maintenance, in violation of the Sherman Act. To paraphrase the Court in *Schwegmann*, "when [the city] compels [landlords] to follow a parallel price policy, it demands private conduct which the Sherman Act forbids." *Id.*, at 389. "[W]hen [landlords] are *forced* to abandon price competition, they are driven into a compact in violation of the spirit of the proviso which forbids 'horizontal' price fixing." *Ibid.* (emphasis in original).

B

Even if I accepted the Court's analysis of the antitrust preemption issue, I would find a functional "combination" in this case between the city of Berkeley and its officials, on the one hand, and the landlords on the other—a combination that operates to fix prices for rental units in Berkeley. To reach a contrary result, the Court simply states a conclusion—that "[a] restraint imposed unilaterally by government does not become concerted action within the meaning of the statute simply because it has a coercive effect upon parties who must obey the law." *Ante*, at 267. The Court doesn't explain why this is so—it simply baldly asserts that "[t]he ordinary relationship between the government and those who must obey its regulatory commands whether they wish to or not is not enough to establish a conspiracy." *Ibid.* The best I can make of this is that the Court apparently would interpret the Sherman Act to forbid only privately arranged price-fixing schemes. See *ante*, at 267–269. That interpretation would be plainly misguided.

Section 1 of the Sherman Act declares illegal restraints of trade resulting from any "contract, combination . . . , or conspiracy." 15 U. S. C. § 1. Understandably, that wording has led the Court to draw a "basic distinction" between concerted and independent action, and to hold that "[i]ndependent action is not proscribed" by § 1. *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U. S. 752, 761 (1984). However, until today we have not held, or indeed even suggested, that government-imposed restraints on economic actions cannot constitute concerted action. Rather, both *Schwegmann* and *Midcal* held that state statutes which "had a coercive effect upon parties who must obey the law" violated § 1.[2]

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[2] The Court would distinguish *Schwegmann* and *Midcal* based on the role of private parties in setting prices. *Ante*, at 268–269. The Court characterizes the statutory restraints imposed in those cases as "hybrid, in that nonmarket mechanisms merely enforce private marketing decisions." *Ante*, at 267. In this case, the Court argues, Berkeley's landlords have no control over the prices they charge. *Ibid.*

True, in both cases private parties, rather than the State, were largely responsible for setting the prices that retailers had to adhere to. However, the lack of state supervision over price-fixing activities was only relevant to whether the challenged statutes were immune from antitrust liability under *Parker* v. *Brown*, 317 U. S. 341 (1943), see *Midcal*, 445 U. S., at 105; neither decision drew the distinction the Court today creates between "unilateral" and "hybrid" governmental restraints. In both cases the chal-

If the Ordinance allowed the individual landlords ultimately to set their own rental prices, I might understand the Court's conclusion that any resulting price restraints did not necessarily result from collective action. Cf. *Monsanto Co.* v. *Spray-Rite Service Corp.*, *supra*, at 761. However, because the Ordinance has the force of law, the city can compel landlords to do what the Sherman Act plainly forbids—to fix prices for rental units in Berkeley. Regardless of whether the landlords "agree" to the prices charged, the circumstances here clearly "exclude the possibility that the [city and the landlords] were acting independently." 465 U. S., at 764. The Ordinance eliminates price competition more effectively than any private "agreement" ever could, and is therefore pre-empted by the Sherman Act. The Court's contrary conclusion does not further, as it argues, but rather distorts "traditional antitrust analysis." *Ante*, at 264.

II

Ultimately, the Court is holding that a municipality's authority to protect the public welfare should not be constrained by the Sherman Act. That holding excludes a broad range of local government anticompetitive activities from the reach of the antitrust laws. This flies in the face of the fact that Congress has not enacted such a broad antitrust exemption for municipalities. See *Community Communications Co.* v. *Boulder*, 455 U. S. 40 (1982); *Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389 (1978); cf. 15 U. S. C. §35(a) (1982 ed., Supp. II) (immunizing local governments

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lenged statute was found invalid simply because it compelled private parties to charge fixed prices for their products, conduct which the Sherman Act forbids. See *Schwegmann*, 341 U. S., at 389; *Midcal*, *supra*, at 103. The Court's "distinction" ignores the fact that price fixing has the same deleterious effect upon the competitive market whether prices are set by an administrative body or by private parties. Thus, regardless of whether Berkeley's landlords have some role in setting the prices they must charge, the coercive effect of the city's Ordinance results in concerted action violative of the Sherman Act.

only from liability for damages for violations of the antitrust laws). "In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws, . . . we [have been] especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach." *Lafayette, supra,* at 412–413 (plurality opinion). "The *Parker* state-action exemption reflects Congress' intention to embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution. But this principle contains its own limitation: Ours is a '*dual* system of government,' *Parker,* 317 U. S., at 351 (emphasis added), which has no place for sovereign cities." *Community Communications Co.* v. *Boulder, supra,* at 53. Of course, our decisions do not foreclose municipalities from enacting anticompetitive measures in the public interest, but only require that such actions be state-authorized and be implemented pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with regulation or monopoly service. See 455 U. S., at 52. Berkeley's Ordinance plainly is not exempt from antitrust scrutiny under this standard.

Appellees suggest that three considerations support their argument that the Ordinance implements a clearly articulated and affirmatively expressed state policy authorizing municipalities to enact rent control measures: (1) the state legislature's 1972 ratification of a city rent control charter amendment; (2) the California Supreme Court's decision in *Birkenfeld* v. *City of Berkeley,* 17 Cal. 3d 129, 550 P. 2d 1001 (1976), which ultimately invalidated that amendment; and (3) the city's state-law obligation to provide affordable housing. None of these considerations support appellees' position.

First, in 1972, Berkeley adopted a rent control charter amendment, which was approved by concurrent resolution of both houses of the state legislature.[3] There are serious doubts that this purely *pro forma* approval would qualify the amendment for the *Parker* exemption. See *Cantor* v. *Detroit Edison Co.*, 428 U. S. 579 (1976). In any event, that amendment was subsequently invalidated by the California Supreme Court, and the legislature's actions respecting its passage afford no support for the claimed exemption of the *current* Ordinance from antitrust scrutiny.

Second, the *Birkenfeld* decision, while invalidating Berkeley's rent control amendment, found state authority for such measures in constitutional provisions conferring upon cities the power to "make and enforce . . . all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." 17 Cal. 3d, at 140, 550 P. 2d, at 1009–1010. But we have made clear that such general grants of authority do not constitute the required mandate to engage in conduct that necessarily constitutes a violation of the antitrust laws. See *Community Communications Co.*, 455 U. S., at 55. "Acceptance of such a proposition . . . would wholly eviscerate the concepts of 'clear articulation and affirmative expression' that our precedents require." *Id.*, at 56.

Third, state law requires cities to "make adequate provision for the housing needs of all economic segments of the community." Cal. Govt. Code Ann. § 65580(d) (West 1983). But, although appellees argue that rent control measures are a "foreseeable result" of these statutory obligations, see *Hallie* v. *Eau Claire*, 471 U. S. 34 (1985), those laws are expressly neutral with respect to a city's authority to impose rent controls. California Govt. Code Ann. § 65589(b) (West 1983) expressly provides that "nothing in this article shall be construed to be a grant of authority or a repeal of any authority which may exist of a local government to impose rent controls." See also Cal. Health & Safety Code Ann. § 50202 (West Supp. 1986) ("[N]othing in this division shall authorize the imposition of rent regulations or controls"). The requirement of "'clear articulation and affirmative expression' is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive." *Community Communications Co., supra,* at 55 (emphasis in original). Plainly, by that standard the Ordinance does not qualify for the *Parker* exemption from antitrust liability.

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[3] At that time, the State Constitution required the legislature to approve city charter amendments. See *Birkenfeld* v. *City of Berkeley*, 17 Cal. 3d, 129, 137, n. 2, 550 P. 2d, 1001, 1007, n. 2 (1976). In 1974, the State Constitution was amended to eliminate this requirement.

III

Finally, appellees suggest that a finding of pre-emption in this case will severely restrict a municipality's authority to enact a variety of measures in the public interest. "But this argument is simply an attack upon the wisdom of the longstanding congressional commitment to the policy of free markets and open competition embodied in the antitrust laws." *Community Communications Co., supra,* at 56. Congress may ultimately agree with appellees' argument, and may choose to amend the antitrust laws to grant municipalities broad discretion to enact anticompetitive measures in the public interest. Pending such amendment, however, only a clearly articulated and affirmatively expressed state policy will exempt ordinances like this from the reach of the Sherman Act.

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS ET AL. *v.* GOULD INC.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 84-1484. Argued December 9, 1985—Decided February 26, 1986

A Wisconsin statute debars persons or firms who have violated the National Labor Relations Act (NLRA) three times within a 5-year period from doing business with the State. The debarment lasts for three years. After appellee was debarred in 1982, it filed an action for injunctive and declaratory relief in Federal District Court, claiming, *inter alia*, that the Wisconsin statute was pre-empted by the NLRA. The court agreed and granted summary judgment for appellee. The Court of Appeals affirmed.

Held: The NLRA pre-empts the Wisconsin debarment statute. Pp. 286-291.

(a) States are prevented not only from setting forth standards of conduct inconsistent with the NLRA's substantive requirements, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the NLRA. Because the Wisconsin debarment statute functions as a supplemental sanction for violations of the NLRA, it conflicts with the National Labor Relations Board's comprehensive regulation of industrial relations in precisely the same way as would a prohibition against private parties within the State doing business with repeat labor law violators. That Wisconsin has chosen to use its spending power rather than its police power in enacting the debarment statute does not significantly lessen the inherent potential for conflict when two separate remedies are brought to bear on the same activity. Pp. 286-289.

(b) Although state action in the nature of "market participation" is not subject to the restrictions placed on state regulatory power by the Commerce Clause, Wisconsin by prohibiting state purchases from repeat labor law violators is not functioning as a private purchaser; its debarment scheme is tantamount to regulation. In any event, the "market participant" doctrine reflects the particular concerns underlying the Commerce Clause, not any general notion regarding the necessary extent of state power in areas where Congress has acted, as it has here in enacting the NLRA. This is not a case where a State's spending policies address conduct that is of such "peripheral concern" to the NLRA or that implicates "interests so deeply rooted in local feeling and responsibility" that pre-emption should not be inferred. Nor is it a case where spending determinations that bear on labor relations were intentionally left to the States by Congress. The manifest purpose and inevitable effect of the Wisconsin debarment scheme is to enforce the requirements of the NLRA. Pp. 289–291.

750 F. 2d 608, affirmed.

BLACKMUN, J., delivered the opinion for a unanimous Court.

Charles D. Hoornstra, Assistant Attorney General of Wisconsin, argued the cause for appellants. With him on the briefs was *Bronson C. La Follette,* Attorney General.

Columbus R. Gangemi, Jr., argued the cause for appellee. With him on the brief were *George B. Christensen, Gerald C. Peterson, Paul B. Biebel, Jr.,* and *John N. Bilanko.**

JUSTICE BLACKMUN delivered the opinion of the Court.

The question in this case is whether the National Labor Relations Act (NLRA), 29 U. S. C. § 151 *et seq.*, pre-empts a Wisconsin statute debarring certain repeat violators of the Act from doing business with the State. We hold that it does.

I

Wisconsin has directed its Department of Industry, Labor and Human Relations to maintain a list of every person or firm found by judicially enforced orders of the National Labor Relations Board to have violated the NLRA in three separate cases within a 5-year period. See Wis. Stat. § 101.245 (1983–1984).[1] State procurement agents are statu-

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*Briefs of *amici curiae* urging reversal were filed for the State of Connecticut by *Joseph I. Lieberman,* Attorney General, *Elliot F. Gerson,* Deputy Attorney General, and *Arnold B. Feigin, Richard T. Sponzo,* and *Robert E. Walsh,* Assistant Attorneys General; for the National Governors' Association et al. by *Benna Ruth Solomon* and *Peter J. Kalis;* and for the American Federation of Labor and Congress of Industrial Organizations by *Marsha Berzon, David M. Silberman,* and *Laurence Gold.*

Briefs of *amici curiae* urging affirmance were filed for the National Labor Relations Board by *Norton J. Come, Linda Sher,* and *Elinor Hadley Stillman;* for the Chamber of Commerce of the United States by *Peter G. Nash, Dixie L. Atwater,* and *Stephen A. Bokat.*

[1] Section 101.245 provides in relevant part:

"(1) The department [of industry, labor and human relations] shall maintain a list of persons or firms that have been found by the national labor relations board, and by 3 different final decisions of a federal court within a torily forbidden to purchase "any product known to be manufactured or sold by any person or firm included on the list of labor law violators." § 16.75(8).[2] A name remains on the violators' list for three years. § 101.245(4).

5-year period as determined under sub. (1m), if the 3 final decisions involved a cumulative finding of at least three separate violations, to have violated the national labor relations act, 29 U. S. C. 151 et seq., and of persons or firms that have been found to be in contempt of court for failure to correct a violation of the national labor relations act on 3 or more occasions by a court within a 5-year period as determined under sub. (1m) if the 3 contempt findings involved a cumulative total of at least 3 different violations.

"(1m) On or before July 1 of each year the department shall compile the list required under sub. (1) based upon the 5-year period which ended on September 30 of the year preceding.

"(2) This list may be compiled from the records of the national labor relations board.

"(3) Whenever a new name is added to this list the department shall send the name to the department of administration for actions as provided in s. 16.75(8).

"(4) A name shall remain on the list for 3 years."

The statute was enacted as 1979 Wis. Laws, ch. 340, § 3. It became effective May 21, 1980.

[2] Section 16.75(8) provides in relevant part:

"The department [of administration] shall not purchase any product known to be manufactured or sold by any person or firm included on the list of labor law violators compiled by the department of industry, labor and human relations under s. 101.245. The secretary may waive this subsection if maintenance, repair or operating supplies are required to maintain systems or equipment which were purchased by the state from a person or firm included on the list prior to the date of inclusion on the list, or if the secretary finds that there exists an emergency which threatens the public health, safety or welfare and a waiver is necessary to meet the emergency."

We are advised that the statutory ban applies only to purchases by the State and not to purchasing decisions of counties, municipalities, or other political subdivisions of the State. Tr. of Oral Arg. 4.

In addition to disqualifying repeat violators of the NLRA, Wisconsin provides statutory preferences to bids from Wisconsin companies, minority businesses, employers of disabled workers, and prison industries. See Wis. Stat. §§ 16.75(1)(a), (3m)(b), (3s)(a), and (3t)(c) (1983–1984).

Appellee Gould Inc. is a Delaware corporation with its principal place of business in Illinois. In 1982, Wisconsin placed Gould on its list of labor law violators following the judicial enforcement of four Board orders against various divisions of the company, none of which was located in Wisconsin and none of which Gould still owned at the time of its debarment. The State informed Gould that it would enter into no new contract with the company until 1985. The State also announced that it would continue its current contracts with Gould only as long as necessary to avoid contractual penalties, and that while Gould was on the list the State would not purchase products containing components produced by the company. At the time, Gould held state contracts worth over $10,000, and had outstanding bids for additional contracts in excess of $10,000.

Gould filed this action for injunctive and declaratory relief, arguing that the Wisconsin debarment scheme was preempted by the NLRA and violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[3] The United States District Court for the Western District of Wisconsin granted Gould summary judgment on the preemption claim, and did not reach the arguments pertaining to the Fourteenth Amendment. 576 F. Supp. 1290 (1983). The court enjoined the defendant state officials from refusing to do business with Gould, from refusing to purchase products with Gould components, and from including Gould on the list of labor law violators. *Id.*, at 1299; App. to Juris. Statement 86, 87.[4] The Court of Appeals for the Seventh Circuit affirmed in relevant part. 750 F. 2d 608 (1984). We noted probable jurisdiction, 471 U. S. 1115 (1985). As did the District Court and the Court of Appeals, we find it necessary to reach only the pre-emption issue.

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[3] The original complaint also sought monetary damages, but Gould apparently abandoned this request in its motion and briefs for summary judgment. See 576 F. Supp. 1290, 1293, n. 3 (WD Wis. 1983).

Although Gould's debarment was scheduled to end in 1985, Wisconsin does not contend that the case is moot. At a minimum, the problem presented is "capable of repetition, yet evading review." *E. g.*, *Dunn* v. *Blumstein*, 405 U. S. 330, 333, n. 2 (1972); *Moore* v. *Ogilvie*, 394 U. S. 814, 816 (1969); *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911).

II

It is by now a commonplace that in passing the NLRA Congress largely displaced state regulation of industrial relations. Although some controversy continues over the Act's pre-emptive scope, certain principles are reasonably settled. Central among them is the general rule set forth in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959), that States may not regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits. Because "conflict is imminent" whenever "two separate remedies are brought to bear on the same activity," *Garner* v. *Teamsters*, 346 U. S. 485, 498–499 (1953), the *Garmon* rule prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act. See 359 U. S., at 247. The rule is designed to prevent "conflict in its broadest sense" with the "complex and interrelated federal scheme of law, remedy, and administration," *id.*, at 243, and this Court has recognized that "[c]onflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy." *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274, 287 (1971).

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[4] The complaint named as defendants three state agencies, including the Department of Industry, Labor and Human Relations, and four state officials. The District Court dismissed the agency defendants under the Eleventh Amendment but, pursuant to *Ex parte Young*, 209 U. S. 123 (1908), allowed the suit to proceed against the state officials. 576 F. Supp., at 1293. Gould did not appeal the dismissal of the agency defendants, and they appear in this Court only as nominal parties under the Court's Rule 10.4.

Consequently, there can be little doubt that the NLRA would prevent Wisconsin from forbidding *private parties* within the State to do business with repeat labor law violators. Like civil damages for picketing, which the Court refused to allow in *Garmon*, a prohibition against in-state private contracts would interfere with Congress' "integrated scheme of regulation" by adding a remedy to those prescribed by the NLRA. 359 U. S., at 247. Nor does it matter that a supplemental remedy is different in kind from those that may be ordered by the Board, for "judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted." *Id.*, at 243; *Lockridge*, 403 U. S., at 292. Indeed, "to allow the State to grant a remedy . . . which has been withheld from the National Labor Relations Board only accentuates the danger of conflict," *Garmon*, 359 U. S., at 247, because "the range and nature of those remedies that are and are not available is a fundamental part" of the comprehensive system established by Congress. *Lockridge*, 403 U. S., at 287.

Wisconsin does not assert that it could bar its residents from doing business with repeat violators of the NLRA. It contends, however, that the statutory scheme invoked against Gould escapes pre-emption because it is an exercise of the State's spending power rather than its regulatory power. But that seems to us a distinction without a difference, at least in this case, because on its face the debarment statute serves plainly as a means of enforcing the NLRA. The State concedes, as we think it must, that the point of the statute is to deter labor law violations and to reward "fidelity to the law." Tr. of Oral Arg. 4, 6; Brief for Defendants in Support of Motion for Summary Judgment in No. 83-C-1045, (WD Wis.), p. 18. No other purpose could credibly be ascribed, given the rigid and undiscriminating manner in which the statute operates: firms adjudged to have violated the

NLRA three times are automatically deprived of the opportunity to compete for the State's business.[5]

Because Wisconsin's debarment law functions unambiguously as a supplemental sanction for violations of the NLRA, it conflicts with the Board's comprehensive regulation of industrial relations in precisely the same way as would a state statute preventing repeat labor law violators from doing any business with private parties within the State. Moreover, if Wisconsin's debarment law is valid, nothing prevents other States from taking similar action against labor law violators. Indeed, at least four other States already have passed legislation disqualifying repeat or continuing offenders of the NLRA from competing for state contracts.[6] Each additional statute incrementally diminishes the Board's control over enforcement of the NLRA and thus further detracts from the "integrated scheme of regulation" created by Congress.

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[5] The conflict between the challenged debarment statute and the NLRA is made all the more obvious by the essentially punitive rather than corrective nature of Wisconsin's supplemental remedy. The regulatory scheme established for labor relations by Congress is "essentially remedial," and the Board is not generally authorized to impose penalties solely for the purpose of deterrence or retribution. *Republic Steel Corp.* v. *NLRB*, 311 U. S. 7, 10–12 (1940). Wisconsin's debarment sanction, in contrast, functions as punishment and serves no corrective purpose. Punitive sanctions are inconsistent not only with the remedial philosophy of the NLRA, but also in certain situations with the Act's procedural logic. For example, the Board's certification of a bargaining representative is not subject to direct judicial appeal. An employer who believes that the Board erred in approving an election or defining a bargaining unit thus may obtain administrative and judicial review only by refusing to bargain and awaiting an enforcement action by the Board for violation of the Act. See *Magnesium Casting Co.* v. *NLRB*, 401 U. S. 137, 139 (1971); *AFL* v. *NLRB*, 308 U. S. 401 (1940). One of Gould's violations in fact occurred in precisely this manner. See *Gould, Inc., Elec. Components Div.* v. *NLRB*, 610 F. 2d 316 (CA5 1980). An unsuccessful challenge of this sort, if pursued in good faith, will generally present an especially inappropriate occasion for punitive sanctions.

[6] See Conn. Gen. Stat. § 31–57a (1985); Md. State Finance & Procurement Code Ann. § 13–404 (1985); Mich. Comp. Laws §§ 423.322, .323, and .324 (Supp. 1985); Ohio Rev. Code Ann. § 121.23 (1984).

That Wisconsin has chosen to use its spending power rather than its police power does not significantly lessen the inherent potential for conflict when "two separate remedies are brought to bear on the same activity," *Garner*, 346 U. S., at 498–499. To uphold the Wisconsin penalty simply because it operates through state purchasing decisions therefore would make little sense. "It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern." *Lockridge*, 403 U. S., at 292.

III

Wisconsin notes correctly that state action in the nature of "market participation" is not subject to the restrictions placed on state regulatory power by the Commerce Clause. See *White* v. *Massachusetts Council of Constr. Employers, Inc.*, 460 U. S. 204 (1983); *Reeves, Inc.* v. *Stake*, 447 U. S. 429 (1980); *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794 (1976). We agree with the Court of Appeals, however, that by flatly prohibiting state purchases from repeat labor law violators Wisconsin "simply is not functioning as a private purchaser of services," 750 F. 2d, at 614; for all practical purposes, Wisconsin's debarment scheme is tantamount to regulation.

In any event, the "market participant" doctrine reflects the particular concerns underlying the Commerce Clause, not any general notion regarding the necessary extent of state power in areas where Congress has acted. In addition to authorizing congressional action, the Commerce Clause limits state action in the absence of federal approval. The Clause restricts "state taxes and regulatory measures impeding free private trade in the national marketplace," but "[t]here is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." *Reeves*, 447 U. S., at 437. The NLRA, in contrast, was designed in large part to "entrus[t] administration of the labor policy for the Nation to a centralized administrative agency." *Garmon*, 359 U. S., at 242; see also, *e. g.*, *NLRB* v. *Nash-Finch Co.*, 404 U. S. 138, 145 (1971) ("The Board is the sole protector of the 'national interest' defined with particularity in the Act") (footnote omitted). What the Commerce Clause would permit States to do in the absence of the NLRA is thus an entirely different question from what States may do with the Act in place. Congressional purpose is of course "'the ultimate touchstone'" of pre-emption analysis, see, *e. g.*, *Allis-Chalmers Corp.* v. *Lueck*, 471 U. S. 202, 208 (1985), quoting *Retail Clerks* v. *Schermerhorn*, 375 U. S. 96, 103 (1963), and we cannot believe that Congress intended to allow States to interfere with the "interrelated federal scheme of law, remedy, and administration," *Garmon*, 359 U. S., at 243, under the NLRA as long as they did so through exercises of the spending power.

Nothing in the NLRA, of course, prevents private purchasers from boycotting labor law violators. But government occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints. Outside the area of Commerce Clause jurisprudence, it is far from unusual for federal law to prohibit States from making spending decisions in ways that are permissible for private parties. See, *e. g.*, *Elrod* v. *Burns*, 427 U. S. 347 (1976); *Perry* v. *Sindermann*, 408 U. S. 593 (1972). The NLRA, moreover, has long been understood to protect a range of conduct against state but not private interference. See, *e. g.*, *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S. 132, 148–151 (1976); *Teamsters* v. *Morton*, 377 U. S. 252, 259–260 (1964); Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337, 1346, 1351–1359 (1972). The Act treats state action differently from private action not merely because they frequently take different forms, but also because in our system States simply are different from private parties and have a different role to play.

We do not say that state purchasing decisions may never be influenced by labor considerations, any more than the NLRA prevents state regulatory power from ever touching on matters of industrial relations. Doubtless some state spending policies, like some exercises of the police power, address conduct that is of such "peripheral concern" to the NLRA, or that implicates "interests so deeply rooted in local feeling and responsibility," that pre-emption should not be inferred. *Garmon,* 359 U. S., at 243–244; see also, *e. g., Belknap, Inc.* v. *Hale,* 463 U. S. 491, 498 (1983). And some spending determinations that bear on labor relations were intentionally left to the States by Congress. See *New York Tel. Co.* v. *New York State Labor Dept.,* 440 U. S. 519 (1979). But Wisconsin's debarment rule clearly falls into none of these categories. We are not faced here with a statute that can even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs, or with a law that pursues a task Congress intended to leave to the States. The manifest purpose and inevitable effect of the debarment rule is to enforce the requirements of the NLRA. That goal may be laudable, but it assumes for the State of Wisconsin a role Congress reserved exclusively for the Board.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

CHICAGO TEACHERS UNION, LOCAL NO. 1, AFT, AFL-CIO, ET AL. *v.* HUDSON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 84-1503. Argued December 2, 1985—Decided March 4, 1986

Petitioner Chicago Teachers Union has been the exclusive collective-bargaining representative of the Chicago Board of Education's educational employees since 1967. Approximately 95% of the employees are members of the Union. Until 1982, the members' dues financed the entire cost of the Union's collective bargaining and contract administration, and nonmembers received the benefits of the Union's representation without making any contributions to its cost. In an attempt to solve this "free rider" problem, the Union and the Board entered into an agreement requiring the Board to deduct "proportionate share payments" from nonmembers' paychecks. The Union determined that the "proportionate share" assessed on nonmembers was 95% of union dues, computed on the basis of the Union's financial records. The Union also established a procedure for considering nonmembers' objections to the deductions. After the deduction was made, a nonmember could object by writing to the Union President, and the objection would then meet a three-stage procedure: (1) the Union's Executive Committee would consider the objection and notify the objector within 30 days of its decision; (2) if the objector disagreed with that decision and appealed within another 30 days, the Union's Executive Board would consider the objection; and (3) if the objector continued to protest after the Executive Board's decision, the Union's President would select an arbitrator. If an objection was sustained at any stage, the remedy would be a reduction in future deductions and a rebate for the objector. Respondent objecting nonmembers of the Union brought suit in Federal District Court, challenging the Union procedure on the grounds that it violated their First Amendment rights to freedom of expression and association and their Fourteenth Amendment due process rights and also permitted the use of their proportionate shares for impermissible purposes. The District Court rejected the challenges and upheld the procedure. The Court of Appeals reversed, holding that the procedure was constitutionally inadequate. The court rejected the Union's defense that its subsequent adoption of an arrangement whereby it voluntarily placed all of the objectors' agency fees in escrow cured any constitutional defects.

Held:

1. Under an agency shop agreement, procedural safeguards are necessary to prevent compulsory subsidization of ideological activity by nonunion employees who object thereto while at the same time not restricting the union's ability to require any employee to contribute to the cost of collective-bargaining activities. The fact that nonunion employees' rights are protected by the First Amendment requires that the procedure be carefully tailored to minimize an agency shop's infringement on those rights. And the nonunion employee must have a fair opportunity to identify the impact on those rights and to assert a meritorious First Amendment claim. Pp. 301–304.

2. Here, the original Union procedure contained three constitutional defects. First, it failed to minimize the risk that nonunion employees' contributions might be temporarily used for impermissible purposes. Second, it failed to provide nonmembers with adequate information about the basis for the proportionate share from which the advance deduction of dues was calculated. And third, it failed to provide for a reasonably prompt decision by an impartial decisionmaker. The nonunion employee, whose First Amendment rights are affected by the agency shop itself and who bears the burden of objecting, is entitled to have his objections addressed in an expeditious, fair, and objective manner. Pp. 304–309.

3. The Union's subsequent adoption of an escrow arrangement did not cure all of these defects. Two still remain—failure to provide an adequate explanation for the advance reduction of dues and to provide for a reasonably prompt decision by an impartial decisionmaker. Pp. 309–310.

743 F. 2d 1187, affirmed.

STEVENS, J., delivered the opinion for a unanimous Court. WHITE, J., filed a concurring opinion, in which BURGER, C. J., joined, *post*, p. 311.

Laurence Gold argued the cause for petitioners. With him on the briefs were *Joseph M. Jacobs*, *Charles Orlove*, *Nancy E. Tripp*, *Thomas P. Brown*, *Patricia S. Whitten*, *Lawrence A. Poltrock*, *Wayne B. Giampietro*, and *David M. Silberman*.

Edwin Vieira, Jr., argued the cause and filed a brief for respondents.*

**Robert H. Chanin* and *James J. Brudney* filed a brief for the National Education Association as *amicus curiae* urging reversal.

Ronald A. Zumbrun, *John H. Findley*, and *Anthony T. Caso* filed a brief for William Cumero as *amicus curiae*.

JUSTICE STEVENS delivered the opinion of the Court.

In *Abood* v. *Detroit Board of Education*, 431 U. S. 209 (1977), "we found no constitutional barrier to an agency shop agreement between a municipality and a teacher's union insofar as the agreement required every employee in the unit to pay a service fee to defray the costs of collective bargaining, contract administration, and grievance adjustment. The union, however, could not, consistently with the Constitution, collect from dissenting employees any sums for the support of ideological causes not germane to its duties as collective-bargaining agent." *Ellis* v. *Railway Clerks*, 466 U. S. 435, 447 (1984). The *Ellis* case was primarily concerned with the need "to define the line between union expenditures that all employees must help defray and those that are not sufficiently related to collective bargaining to justify their being imposed on dissenters." *Ibid.* In contrast, this case concerns the constitutionality of the procedure adopted by the Chicago Teachers Union, with the approval of the Chicago Board of Education, to draw that necessary line and to respond to nonmembers' objections to the manner in which it was drawn.

I

The Chicago Teachers Union has acted as the exclusive collective-bargaining representative of the Board's educational employees continuously since 1967. Approximately 95% of the 27,500 employees in the bargaining unit are members of the Union. Until December 1982, the Union members' dues financed the entire cost of the Union's collective bargaining and contract administration. Nonmembers received the benefits of the Union's representation without making any financial contribution to its cost.

In an attempt to solve this "free rider" problem, the Union made several proposals for a "fair share fee" clause in the labor contract. Because the Illinois School Code did not expressly authorize such a provision, the Board rejected these proposals until the Illinois General Assembly amended the

School Code in 1981.[1] In the following year, the Chicago Teachers Union and the Chicago Board of Education entered into an agreement requiring the Board to deduct "proportionate share payments" from the paychecks of nonmembers. The new contractual provision authorized the Union to specify the amount of the payment; it stipulated that the amount could not exceed the members' dues. The contractual provision also required the Union to indemnify the Board for all action taken to implement the new provision.

For the 1982–1983 school year, the Union determined that the "proportionate share" assessed on nonmembers was 95% of union dues. At that time, the union dues were $17.35 per month for teachers and $12.15 per month for other covered employees; the corresponding deduction from the nonmembers' checks thus amounted to $16.48 and $11.54 for each of the 10 months that dues were payable.

Union officials computed the 95% fee on the basis of the Union's financial records for the fiscal year ending on June 30, 1982. They identified expenditures unrelated to collective bargaining and contract administration (which they estimated as $188,549.82). They divided this amount by the Union's income for the year ($4,103,701.58) to produce a percentage of 4.6%; the figure was then rounded off to 5% to provide a "cushion" to cover any inadvertent errors.

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[1] The statute, which became effective on August 1, 1981, provided:

"Where a collective bargaining agreement is entered into with an employee representative organization, the school board may include in the agreement a provision requiring employees covered by the agreement who are not members of the representative organization to pay their proportionate share of the cost of the collective bargaining process and contract administration, measured by the amount of dues uniformly required by members. In such case, proportionate share payments shall be deducted by the board from the earnings of the non-member employees and paid to the representative organization." Ill. Rev. Stat., ch. 122, ¶ 10–22.40a (1983).

That statute has now been superseded by the Illinois Educational Labor Relations Act, Ill. Rev. Stat., ch. 48, ¶ 1701 *et seq.* (Supp. 1984).

The Union also established a procedure for considering objections by nonmembers. Before the deduction was made, the nonmember could not raise any objection. After the deduction was made, a nonmember could object to the "proportionate share" figure by writing to the Union President within 30 days after the first payroll deduction. The objection then would meet a three-stage procedure. First, the Union's Executive Committee would consider the objection and notify the objector within 30 days of its decision. Second, if the objector disagreed with that decision and appealed within another 30 days, the Union's Executive Board would consider the objection. Third, if the objector continued to protest after the Executive Board decision, the Union President would select an arbitrator from a list maintained by the Illinois Board of Education. The Union would pay for the arbitration, and, if there were multiple objections, they could be consolidated. If an objection was sustained at any stage of the procedure, the remedy would be an immediate reduction in the amount of future deductions for all nonmembers and a rebate for the objector.

In October 1982, the Union formally requested the Board to begin making deductions and advised it that a hearing procedure had been established for nonmembers' objections. The Board accepted the Union's 95% determination without questioning its method of calculation and without asking to review any of the records supporting it. The Board began to deduct the fee from the paychecks of nonmembers in December 1982. The Board did not provide the nonmembers with any explanation of the calculation, or of the Union's procedures. The Union did undertake certain informational efforts. It asked its member delegates at all schools to distribute flyers, display posters, inform nonmembers of the deductions, and invite nonmembers to join the Union with an amnesty for past fines. It also described the deduction and the protest procedures in the December issue of the Union newspaper, which was distributed to nonmembers.

Three nonmembers—Annie Lee Hudson, K. Celeste Campbell, and Walter Sherrill—sent identical letters of protest to the Union stating that they believed the Union was using part of their salary for purposes unrelated to collective bargaining and demanding that the deduction be reduced. A fourth nonmember—Beverly Underwood—objected to any deduction from her paycheck. The Union's response to each of the four briefly explained how the proportionate-share fee had been calculated, described the objection procedure, enclosed a copy of the Union Implementation Plan, and concluded with the advice that "any objection you may file" would be processed in compliance with that procedure. None of the letters was referred to the Executive Committee. Only Hudson wrote a second letter; her request for detailed financial information was answered with an invitation to make an appointment for an "informational conference" at the Union's office, at which she could review the Union's financial records. The four nonmembers made no further effort to invoke the Union procedures; instead, they challenged the new procedure in court.

II

In March 1983, the four nonmembers, joined by three other nonmembers who had not sent any letters,[2] filed suit in Federal District Court, naming as defendants, the Union, its officials, the Board, and the Board members. They objected to the Union procedure for three principal reasons: it violated their First Amendment rights to freedom of expression and association; it violated their Fourteenth Amendment due process rights; and it permitted the use of their proportionate shares for impermissible purposes.[3]

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[2] The three other nonmembers were Estherlene Holmes, Edna Rose McCoy, and Dr. Debra Ann Petitan. For an unknown reason, proportionate shares had not been deducted from McCoy's paycheck. 573 F. Supp. 1505, 1509, n. 6 (ND Ill. 1983). Proportionate shares had, however, been deducted from the paychecks of the other six plaintiffs. *Id.*, at 1509.

The District Court rejected the challenges. 573 F. Supp. 1505 (ND Ill. 1983). It first noted that the procedure passed the initial threshold established by an earlier Seventh Circuit opinion on the subject because the procedure itself was fair; it represented a good-faith effort by the Union; and it was not unduly cumbersome. The District Court then rejected the First Amendment objection because it found that the procedure was the "least restrictive means" to protect the nonmembers' First Amendment rights while also protecting the Union's legitimate interest in promptly obtaining service fees from nonmembers. The District Court also rejected the argument that the procedure deprived the plaintiffs of property without due process because it did not accept the plaintiffs' analogy to cases requiring predeprivation hearings. Finally, the District Court refused to reach the contention that the nonmembers' proportionate shares were, in fact, being used for impermissible purposes.[4] The District Court found that only two of the plaintiffs (Hudson and Underwood) had validly invoked the Union procedure; that only those two were thus entitled to rebates if their objections were sustained; and that any assessment of the permissible use of the funds should await the outcome of the Union procedure.

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[3] Respondents relied on 42 U. S. C. § 1983 as a basis for their federal constitutional claims. They also alleged pendent state claims. The District Court rejected the pendent claims, and respondents have not pursued them. Similarly, respondents mounted a facial attack on the Illinois statute as violative of the First Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The District Court also rejected this facial attack.

[4] The plaintiffs had challenged, for instance, the Union's 95% calculation because more than half of the Union's income ($2,167,000 of an income of $4,103,701.58) was passed on to affiliated state and national labor organizations. The plaintiffs claimed that some of this money was expended for political or ideological activities.

The posture of the case changed significantly in the Court of Appeals. The plaintiffs no longer focused on the claim that particular expenditures were inappropriate; they concentrated their attack on the procedure used by the Union to determine the amount of the deductions and to respond to their objections.[5] The Union also modified its position. Instead of defending the procedure upheld by the District Court, it advised the Court of Appeals that it had voluntarily placed all of the dissenters' agency fees in escrow, and thereby avoided any danger that respondents' constitutional rights would be violated.

The Court of Appeals was unanimous in its judgment reversing the District Court. 743 F. 2d 1187 (CA7 1984). All three judges agreed that the Constitution requires the Union to follow a procedure that protects the nonmembers from being compelled to subsidize political or ideological activities not germane to the collective-bargaining process, that the Union's objection procedure was inadequate, and that any rebate which allowed the Union temporary use of money for activities that violate the nonmembers' rights was unconstitutional. In his concurring opinion, however, Judge Flaum declined to reach certain questions discussed by the majority.

Specifically, the majority concluded that the category of impermissible expenditures included all those that were not germane to collective bargaining, even if they might not be characterized as "political or ideological." Judge Flaum found it unnecessary to reach this constitutional issue because the procedure could be deemed inadequate without deciding it and because, in his view, the collective-bargaining agreement and the Illinois statute limited agency shop fees to collective-bargaining and representational expenses. However, the majority believed that its conclusion derived from the fact that the possible infringement on the "liberty" of the nonmembers was not limited to the forced subsidization of political or ideological views, but also included the negative dimension of the freedom of association.

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[5] "The unusual feature of this case is that the plaintiffs, while objecting in passing to particular uses of the agency fee, make almost their whole attack on the procedure for determining how much shall be deducted." 743 F. 2d 1187, 1191 (CA7 1984). Respondents do not dispute this assessment.

Determining that the Union's existing procedure was constitutionally inadequate, and that the Union "must go back to the drawing board," *id.*, at 1196, the majority suggested that the "constitutional minimum" of any revised procedure must include "fair notice, a prompt administrative hearing before the Board of Education or some other state or local agency—the hearing to incorporate the usual safeguards for evidentiary hearings before administrative agencies—and a right of judicial review of the agency's decision. The combination of an internal union remedy and an arbitration procedure is unlikely to satisfy constitutional requirements given the nature of the issues to be decided and the union's stake in how they are decided." *Ibid.*[6]

In response to the Union's advice that it had voluntarily placed dissenters' agency fees in escrow, the majority noted that the Union had made no commitment to continue the escrow in the future, had not indicated the terms of the escrow, and, in all events, "[t]he terms cannot be left entirely up to the Union." *Id.*, at 1197.

The importance of the case, and the divergent approaches of other courts to the issue,[7] led us to grant certiorari, 472

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[6] Presumably because the First Amendment arguments were dispositive, neither the majority nor the concurrence mentioned the plaintiffs' objections that they were being deprived of property without due process. The majority viewed its freedom of association analysis in terms of the due process required for a deprivation of liberty. Like the District Court, moreover, the Seventh Circuit rejected the facial challenge to the constitutionality of the Illinois statute.

[7] See, *e. g.*, *Robinson* v. *New Jersey*, 741 F. 2d 598 (CA3 1984), cert. denied, 469 U. S. 1228 (1985); *Kempner* v. *Dearborn Local 2077*, 126 Mich. App. 452, 337 N. W. 2d 354 (1983), appeal dism'd, 469 U. S. 926 (1984); *White Cloud Education Assn.* v. *Board of Education*, 101 Mich. App. 309,

U. S. 1007 (1985). We affirm the judgment of the Court of Appeals, but we do not find it necessary to resolve all of the questions discussed in its opinion.

III

In *Abood* v. *Detroit Board of Education*, 431 U. S. 209 (1977), we recognized that requiring nonunion employees to support their collective-bargaining representative "has an impact upon their First Amendment interests," *id.*, at 222, and may well "interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit," *ibid.* See also *id.*, at 255 (POWELL, J., concurring in judgment). We nevertheless rejected the claim that it was unconstitutional for a public employer to designate a union as the exclusive collective-bargaining representative of its employees, and to require nonunion employees, as a condition of employment, to pay a fair share of the union's cost of negotiating and administering a collective-bargaining agreement.[8] We also held, however, that nonunion employees do have a constitutional right to

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300 N. W. 2d 551 (1980), appeal dism'd, 469 U. S. 875 (1984); *School Committee of Greenfield* v. *Greenfield Education Assn.*, 385 Mass. 70, 431 N. E. 2d 180 (1982); *Association of Capitol Powerhouse Engineers* v. *Division of Building and Grounds*, 89 Wash. 2d 177, 570 P. 2d 1042 (1977).

[8] Earlier cases had construed the Railway Labor Act to permit a similar arrangement without violating the Constitution. See *Railway Clerks* v. *Allen*, 373 U. S. 113 (1963); *Machinists* v. *Street*, 367 U. S. 740 (1961); *Railway Employees* v. *Hanson*, 351 U. S. 225 (1956). In *Abood*, we emphasized that those cases reflected the important "principle of exclusive union representation," 431 U. S., at 220, and that they accorded great weight to the congressional judgment that "it would promote peaceful labor relations to permit a union and an employer to conclude an agreement requiring employees who obtain the benefit of union representation to share its cost." *Id.*, at 219. See also *Ellis* v. *Railway Clerks*, 466 U. S. 435, 455–456 (1984) ("[B]y allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights. . . . It has long been settled that such interference with First Amendment rights is justified by the governmental interest in industrial peace").

"prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative." *Id.*, at 234.[9]

The question presented in this case is whether the procedure used by the Chicago Teachers Union and approved by the Chicago Board of Education adequately protects the basic distinction drawn in *Abood*. "[T]he objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Id.*, at 237.

Procedural safeguards are necessary to achieve this objective for two reasons. First, although the government interest in labor peace is strong enough to support an "agency shop"[10] notwithstanding its limited infringement on nonunion employees' constitutional rights, the fact that those rights are protected by the First Amendment requires that the procedure be carefully tailored to minimize the infringement.[11] Second, the nonunion employee—the individual whose First Amendment rights are being affected—must have a fair opportunity to identify the impact of the governmental action on his interests and to assert a meritorious First Amendment claim.[12]

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[9] We explained that this right is firmly grounded in the First Amendment:

"The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State. See *Elrod* v. *Burns*, [427 U. S.], at 356–357; *Stanley* v. *Georgia*, 394 U. S. 557, 565; *Cantwell* v. *Connecticut*, 310 U. S. 296, 303–304. . . .

. . . . .

"These principles prohibit a State from compelling any individual to affirm his belief in God, *Torcaso* v. *Watkins*, 367 U. S. 488, or to associate with a political party, *Elrod* v. *Burns*, *supra;* see 427 U. S., at 363–364, n. 17, as a condition of retaining public employment. They are no less applicable to the case at bar, and they thus prohibit the appellees from requiring any of the appellants to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher." 431 U. S., at 234–235 (footnote omitted).

We also emphasized that freedom of association, as well as freedom of expression, supported our conclusion. See *id.*, at 233. See also *Roberts* v. *United States Jaycees*, 468 U. S. 609, 623 (1984) (citing *Abood* for the principle that "[f]reedom of association . . . plainly presupposes a freedom not to associate").

In *Ellis* v. *Railway Clerks*, 466 U. S., at 443, we determined that, under the Railway Labor Act, a "pure rebate approach is inadequate." We explained that, under such an approach, in which the union refunds to the non-union employee any money to which the union was not entitled, "the union obtains an involuntary loan for purposes to which the employee objects." *Id.*, at 444. We noted the possibility of "readily available alternatives, such as advance reduction of dues and/or interest-bearing escrow accounts," *ibid.*, but, for purposes of that case, it was sufficient to strike down the rebate procedure.

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[10] Under an "agency shop" arrangement, a union that acts as exclusive bargaining representative may charge nonunion members, who do not have to join the union or pay union dues, a fee for acting as their bargaining representative. R. Gorman, Basic Text on Labor Law 642 (1976).

[11] See *Roberts* v. *United States Jaycees*, *supra*, at 623 (Infringements on freedom of association "may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms"); *Elrod* v. *Burns*, 427 U. S. 347, 363 (1976) (government means must be "least restrictive of freedom of belief and association"); *Kusper* v. *Pontikes*, 414 U. S. 51, 58–59 (1973) ("[E]ven when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty"); *NAACP* v. *Button*, 371 U. S. 415, 438 (1963) ("Precision of regulation must be the touchstone" in the First Amendment context).

[12] "[P]rocedural safeguards often have a special bite in the First Amendment context." G. Gunther, Cases and Materials on Constitutional Law 1373 (10th ed. 1980). Commentators have discussed the importance of procedural safeguards in our analysis of obscenity, Monaghan, First Amendment "Due Process," 83 Harv. L. Rev. 518, 520–524 (1970); overbreadth, L. Tribe, American Constitutional Law 734–736 (1978); vagueness, Gunther, *supra*, at 1373, n. 2, and 1185–1195; and public forum permits, Blasi, Prior Restraints on Demonstrations, 68 Mich. L. Rev. 1481, 1534–1572 (1970). The purpose of these safeguards is to insure that the government treads with sensitivity in areas freighted with First Amendment concerns. See generally Monaghan, *supra*, at 551 ("The first amendment due process cases have shown that first amendment rights are fragile and can be destroyed by insensitive procedures").

In this case, we must determine whether the challenged Chicago Teachers Union procedure survives First Amendment scrutiny, either because the procedure upheld by the District Court was constitutionally sufficient, or because the subsequent adoption of an escrow arrangement cured any constitutional defect. We consider these questions in turn.[13]

IV

The procedure that was initially adopted by the Union and considered by the District Court contained three fundamental flaws.[14] First, as in *Ellis*, a remedy which merely offers dissenters the possibility of a rebate does not avoid the risk that dissenters' funds may be used temporarily for an improper purpose. "[T]he Union should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining." *Abood*, 431 U. S., at 244 (concurring opinion). The amount at stake for each individual dissenter does not diminish this concern. For, whatever the amount, the quality of respondents' interest in not being compelled to subsidize the propagation of political or ideological views that they oppose is clear. In *Abood*, we emphasized this point by quoting the comments of Thomas Jefferson and James Madison about the tyrannical character of forcing an individual to contribute even "three pence" for the "propagation of opinions which he disbelieves."[15] A forced exaction followed by a rebate equal to the amount improperly expended is thus not a permissible response to the nonunion employees' objections.

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[13] Respondents argue that this case should be considered through the prism of the procedural due process protections necessary for deprivations of property. As in *Abood*, we analyze the problem from the perspective of the First Amendment concerns. We are convinced that, in this context, the procedures required by the First Amendment also provide the protections necessary for any deprivation of property.

Moreover, in view of the fact that the First Amendment principles identified in *Abood* require procedural safeguards and in view of the fact that respondents' challenge is to the procedure, not the expenditures, we find it unnecessary to resolve any question concerning nongermane, nonideological expenditures. Unlike the Seventh Circuit, we are not convinced that resolution of the constitutional nongermaneness question will lead to appreciably different procedural requirements, and we thus find no need to reach that constitutional question. See *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 568–572 (1947). Cf. *Ellis* v. *Railway Clerks*, 466 U. S. 435 (1984) (analyzing specific challenged expenditures under the Railway Labor Act and, as necessary, under the First Amendment).

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[14] Like the Seventh Circuit, we consider the procedure as it was presented to the District Court. It is clear that "voluntary cessation of allegedly illegal conduct does not moot a case." *United States* v. *Concentrated Phosphate Export Assn., Inc.*, 393 U. S. 199, 203 (1968). See also *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U. S. 283, 289 (1982); *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632 (1953). The same concerns—the fear that a defendant would be "free to return to his old ways," *ibid.*, and that he would have "a powerful weapon against public law enforcement," *ibid.*—dictate that we review the legality of the practice defended before the District Court.

[15] "James Madison, the First Amendment's author, wrote in defense of religious liberty: 'Who does not see . . . [t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?' 2 The Writings of James Madison 186 (G. Hunt ed. 1901). Thomas Jefferson agreed that 'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.' I. Brant, James Madison: The Nationalist 354 (1948)." *Abood*, 431 U. S., at 234–235, n. 31.

Second, the "advance reduction of dues" was inadequate because it provided nonmembers with inadequate information about the basis for the proportionate share. In *Abood,* we reiterated that the nonunion employee has the burden of raising an objection, but that the union retains the burden of proof: "'Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion.'" *Abood,* 431 U. S., at 239–240, n. 40, quoting *Railway Clerks* v. *Allen,* 373 U. S. 113, 122 (1963).[16] Basic considerations of fairness, as well as concern for the First Amendment rights at stake, also dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee. Leaving the nonunion employees in the dark about the source of the figure for the agency fee—and requiring them to object in order to receive information—does not adequately protect the careful distinctions drawn in *Abood.*[17]

In this case, the original information given to the nonunion employees was inadequate. Instead of identifying the expenditures for collective bargaining and contract administration that had been provided for the benefit of nonmembers as well as members—and for which nonmembers as well as members can fairly be charged a fee—the Union identified the amount that it admittedly had expended for purposes that did not benefit dissenting nonmembers. An acknowledgment that nonmembers would not be required to pay any part of 5% of the Union's total annual expenditures was not an adequate disclosure of the reasons why they were required to pay their share of 95%.[18]

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[16] The nonmember's "burden" is simply the obligation to make his objection known. See *Machinists* v. *Street,* 367 U. S., at 774 ("[D]issent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee"); *Railway Clerks* v. *Allen,* 373 U. S., at 119; *Abood,* 431 U. S., at 238.

[17] Although public sector unions are not subject to the disclosure requirements of the Labor-Management Reporting and Disclosure Act, see 29 U. S. C. § 402(e), the fact that private sector unions have a duty of disclosure suggests that a limited notice requirement does not impose an undue burden on the union. This is not to suggest, of course, that the information required by that Act, see 29 U. S. C. § 431(b); 29 CFR § 403.3 (1985), is either necessary or sufficient to satisfy the First Amendment concerns in this context.

Finally, the original Union procedure was also defective because it did not provide for a reasonably prompt decision by an impartial decisionmaker. Although we have not so specified in the past,[19] we now conclude that such a requirement is necessary. The nonunion employee, whose First Amendment rights are affected by the agency shop itself and who bears the burden of objecting, is entitled to have his objections addressed in an expeditious, fair, and objective manner.[20]

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[18] We continue to recognize that there are practical reasons why "[a]bsolute precision" in the calculation of the charge to nonmembers cannot be "expected or required." *Allen*, 373 U. S., at 122, quoted in *Abood*, 431 U. S., at 239–240, n. 40. Thus, for instance, the Union cannot be faulted for calculating its fee on the basis of its expenses during the preceding year. The Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor. With respect to an item such as the Union's payment of $2,167,000 to its affiliated state and national labor organizations, see n. 4, *supra*, for instance, either a showing that none of it was used to subsidize activities for which nonmembers may not be charged, or an explanation of the share that was so used was surely required.

[19] Our prior opinions have merely suggested the desirability of an internal union remedy. See *Abood*, *supra*, at 240, and n. 41; *Allen*, *supra*, at 122.

[20] We reject the Union's suggestion that the availability of ordinary judicial remedies is sufficient. This contention misses the point. Since the agency shop itself is "a significant impingement on First Amendment rights," *Ellis*, 466 U. S., at 455, the government and union have a responsibility to provide procedures that minimize that impingement and that fa-

The Union's procedure does not meet this requirement. As the Seventh Circuit observed, the "most conspicuous feature of the procedure is that from start to finish it is entirely controlled by the union, which is an interested party, since it is the recipient of the agency fees paid by the dissenting employees." 743 F. 2d, at 1194–1195. The initial consideration of the agency fee is made by Union officials, and the first two steps of the review procedure (the Union Executive Committee and Executive Board) consist of Union officials. The third step—review by a Union-selected arbitrator—is also inadequate because the selection represents the Union's unrestricted choice from the state list.[21]

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cilitate a nonunion employee's ability to protect his rights. We are considering here the procedural adequacy of the agency shop arrangement itself; we presume that the courts remain available as the ultimate protectors of constitutional rights.

In other First Amendment contexts, of course, we have required swift judicial review of the challenged governmental action. See, *e. g.*, *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546 (1975); *Blount* v. *Rizzi*, 400 U. S. 410 (1971); *Freedman* v. *Maryland*, 380 U. S. 51 (1965). In this context, we do not believe that such special judicial procedures are necessary. Clearly, however, if a State chooses to provide extraordinarily swift judicial review for these challenges, that review would satisfy the requirement of a reasonably prompt decision by an impartial decisionmaker.

[21] We do not agree, however, with the Seventh Circuit that a full-dress administrative hearing, with evidentiary safeguards, is part of the "constitutional minimum." Indeed, we think that an expeditious arbitration might satisfy the requirement of a reasonably prompt decision by an impartial decisionmaker, so long as the arbitrator's selection did not represent the Union's unrestricted choice. In contrast to the Union's procedure here, selection of an arbitrator frequently does not represent one party's unrestricted choice from a list of state-approved arbitrators. See F. Elkouri & E. Elkouri, How Arbitration Works 135–137 (4th ed. 1985); O. Fairweather, Practice and Procedure in Labor Arbitration 79–90 (2d ed. 1981).

The arbitrator's decision would not receive preclusive effect in any subsequent § 1983 action. See *McDonald* v. *West Branch*, 466 U. S. 284 (1984).

Thus, the original Union procedure was inadequate because it failed to minimize the risk that nonunion employees' contributions might be used for impermissible purposes, because it failed to provide adequate justification for the advance reduction of dues, and because it failed to offer a reasonably prompt decision by an impartial decisionmaker.

V

The Union has not only created an escrow of 100% of the contributions exacted from the respondents, but has also advised us that it would not object to the entry of a judgment compelling it to maintain an escrow system in the future. The Union does not contend that its escrow has made the case moot. Rather, it takes the position that because a 100% escrow completely avoids the risk that dissenters' contributions could be used improperly, it eliminates any valid constitutional objection to the procedure and thereby provides an adequate remedy in this case. We reject this argument.

Although the Union's self-imposed remedy eliminates the risk that nonunion employees' contributions may be temporarily used for impermissible purposes, the procedure remains flawed in two respects. It does not provide an adequate explanation for the advance reduction of dues, and it does not provide a reasonably prompt decision by an impartial decisionmaker. We reiterate that these characteristics are required because the agency shop itself impinges on the nonunion employees' First Amendment interests, and because the nonunion employee has the burden of objection. The appropriately justified advance reduction and the prompt, impartial decisionmaker are necessary to minimize both the impingement and the burden.[22]

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[22] In view of the fact that plaintiffs established a constitutional violation, moreover, the task of fashioning a proper remedy is one that should be performed by the District Court after all interested parties have had an opportunity to be heard. The judicial remedy for a proven violation of law will often include commands that the law does not impose on the community at

We need not hold, however, that a 100% escrow is constitutionally required. Such a remedy has the serious defect of depriving the Union of access to some escrowed funds that it is unquestionably entitled to retain. If, for example, the original disclosure by the Union had included a certified public accountant's verified breakdown of expenditures, including some categories that no dissenter could reasonably challenge, there would be no reason to escrow the portion of the nonmember's fees that would be represented by those categories.[23] On the record before us, there is no reason to believe that anything approaching a 100% "cushion" to cover the possibility of mathematical errors would be constitutionally required. Nor can we decide how the proper contribution that might be made by an independent audit, in advance, coupled with adequate notice, might reduce the size of any appropriate escrow.

Thus, the Union's 100% escrow does not cure all of the problems in the original procedure. Two of the three flaws remain, and the procedure therefore continues to provide less than the Constitution requires in this context.

VI

We hold today that the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.

The determination of the appropriate remedy in this case is a matter that should be addressed in the first instance by the District Court. The Court of Appeals correctly reversed the

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large. See *National Society of Professional Engineers* v. *United States*, 435 U. S. 679, 697–698 (1978); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 15–16 (1971).

[23] If the Union chooses to escrow less than the entire amount, however, it must carefully justify the limited escrow on the basis of the independent audit, and the escrow figure must itself be independently verified.

District Court's original judgment and remanded the case for further proceedings. That judgment of reversal is affirmed, and those further proceedings should be consistent with this opinion.

It is so ordered.

JUSTICE WHITE, with whom the THE CHIEF JUSTICE joins, concurring.

I join the opinion and judgment of the Court with the following observations. First, since the Court, as did Judge Flaum in the Court of Appeals, deems it unnecessary to reach the issue of nongermane, nonideological expenditures, the panel's remarks on the subject are therefore obvious dicta. Under our cases, they are also very questionable.

Second, as I understand the Court's opinion, the complaining nonmember need only complain; he need not exhaust internal union hearing procedures, if any, before going to arbitration. However, if the union provides for arbitration and complies with the other requirements specified in our opinion, it should be entitled to insist that the arbitration procedure be exhausted before resorting to the courts.

WHITLEY, INDIVIDUALLY AND AS ASSISTANT SUPERINTENDENT, OREGON STATE PENITENTIARY, ET AL. *v.* ALBERS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84-1077. Argued December 10, 1985—Decided March 4, 1986

During the course of a riot at the Oregon State Penitentiary, a prison officer was taken hostage and placed in a cell on the upper tier of a two-tier cellblock. In an attempt to free the hostage, prison officials worked out a plan that called for the prisoner security manager to enter the cellblock unarmed, followed by prison officers armed with shotguns. The security manager ordered one of the officers to fire a warning shot and to shoot low at any inmates climbing the stairs to the upper tier since he would be climbing the stairs to free the hostage. One of the officers, after firing a warning shot, shot respondent in the left knee when he started up the stairs. Respondent subsequently brought an action in Federal District Court against petitioner prison officials pursuant to 42 U. S. C. § 1983, alleging, *inter alia*, that they had deprived him of his rights under the Eighth and Fourteenth Amendments. At the conclusion of the trial, the District Court directed a verdict for petitioners. The Court of Appeals reversed and remanded for a new trial on respondent's Eighth Amendment claim.

Held:

1. The shooting of respondent did not violate his Eighth Amendment right to be free from cruel and unusual punishments. Pp. 318–326.

(a) It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring control over a tumultuous cellblock. The infliction of pain in the course of a prison security measure, therefore, does not amount to cruel and unusual punishment simply because it may appear in retrospect that the degree of force authorized or applied for security purposes was unreasonable, and hence unnecessary in the strict sense. The general requirement that an Eighth Amendment claimant establish the unnecessary and wanton infliction of pain should also be applied with due regard for differences in the kind of conduct involved. Thus, where a prison security measure is undertaken to resolve a disturbance, such as occurred in this case, that poses significant risks to the safety of inmates and prison staff, the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on whether force was applied in a good-faith effort to maintain or restore discipline or maliciously and sadistically for the purpose of causing harm. Pp. 318–322.

(b) Viewing the evidence in the light most favorable to respondent, as must be done in reviewing the decision reversing the trial court's directed verdict for petitioners, it does not appear that the evidence supports a reliable inference of wantonness in the infliction of pain under the above standard. Evidence arguably showing that the prison officials erred in judgment when they decided on a plan that employed potentially deadly force, falls far short of a showing that there was no plausible basis for their belief that this degree of force was necessary. In particular, the order to shoot, qualified by an instruction to shoot low, falls short of commanding the infliction of pain in a wanton and unnecessary fashion. Nor was the failure to provide for a verbal warning, in addition to a warning shot, so insupportable as to be wanton, since any inmate running up the stairs after the prison security manager could reasonably be thought to pose a threat to the rescue attempt. And the failure to take into account the possibility that respondent might climb the stairs in an effort to return to his cell does not rise to the level of an Eighth Amendment violation. Assuming that the prison officer shot at respondent rather than at the inmates as a group does not establish that the officer shot respondent knowing that it was unnecessary to do so. Under all these circumstances, the shooting was part and parcel of a good-faith effort to restore prison security. Pp. 322–326.

2. In this case, the Due Process Clause of the Fourteenth Amendment cannot serve as an alternative basis for affirmance, independently of the Eighth Amendment. In the prison security context, the Due Process Clause affords respondent no greater protection than does the Cruel and Unusual Punishments Clause. Pp. 326–327.

743 F. 2d 1372, reversed.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and REHNQUIST, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined, and in all but n. 2 of which STEVENS, J., joined, *post*, p. 328.

Dave Frohnmayer, Attorney General of Oregon, argued the cause for petitioners. With him on the briefs were *William F. Gary*, Deputy Attorney General, *James E. Mountain, Jr.*, Solicitor General, *Virginia L. Linder*, Assistant Solicitor General, and *Robert M. Atkinson*, Assistant Attorney General.

Gene B. Mechanic, by appointment of the Court, 474 U. S. 809, argued the cause and filed a brief for respondent.*

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to decide what standard governs a prison inmate's claim that prison officials subjected him to cruel and unusual punishment by shooting him during the course of their attempt to quell a prison riot.

I

At the time he was injured, respondent Gerald Albers was confined in cellblock "A" of the Oregon State Penitentiary. Cellblock "A" consists of two tiers of barred cells housing some 200 inmates. The two tiers are connected by a stairway that offers the only practical way to move from one tier to another.

At about 8:30 on the evening of June 27, 1980, several inmates were found intoxicated at the prison annex. Prison guards attempted to move the intoxicated prisoners, some of whom resisted, to the penitentiary's isolation and segregation facility. This incident could be seen from the cell windows in cellblock "A," and some of the onlookers became agitated because they thought that the guards were using unnecessary force. Acting on instructions from their superiors, Officers Kemper and Fitts, who were on duty in cellblock "A," ordered the prisoners to return to their cells. The order was not obeyed. Several inmates confronted the two officers, who were standing in the open area of the lower tier. One inmate, Richard Klenk, jumped from the second tier and assaulted Officer Kemper. Kemper escaped but Officer

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**Acting Solicitor General Fried, Acting Assistant Attorney General Willard, Deputy Solicitor General Geller*, and *Andrew J. Pincus* filed a brief for the United States as *amicus curiae* urging reversal.

Steven Ney and *Michael Mushlin* filed a brief for the Correctional Association of New York et al. as *amici curiae* urging affirmance.

Fitts was taken hostage. Klenk and other inmates then began breaking furniture and milling about.

Upon being informed of the disturbance, petitioner Harol Whitley, the prison security manager, entered cellblock "A" and spoke with Klenk. Captain Whitley agreed to permit four residents of cellblock "A" to view the inmates who had been taken to segregation earlier. These emissaries reported back that the prisoners in segregation were intoxicated but unharmed. Nonetheless, the disturbance in cellblock "A" continued.

Whitley returned to the cellblock and confirmed that Fitts was not harmed. Shortly thereafter, Fitts was moved from an office on the lower tier to cell 201 on the upper tier, and Klenk demanded that media representatives be brought into the cellblock. In the course of the negotiations, Klenk, who was armed with a homemade knife, informed Whitley that one inmate had already been killed and other deaths would follow. In fact, an inmate had been beaten but not killed by other prisoners.

Captain Whitley left the cellblock to organize an assault squad. When Whitley returned to cellblock "A," he was taken to see Fitts in cell 201. Several inmates assured Whitley that they would protect Fitts from harm, but Klenk threatened to kill the hostage if an attempt was made to lead an assault. Klenk and at least some other inmates were aware that guards had assembled outside the cellblock and that shotguns had been issued. Meanwhile, respondent had left his cell on the upper tier to see if elderly prisoners housed on the lower tier could be moved out of harm's way in the event that tear gas was used. Respondent testified that he asked Whitley for the key to the row of cells housing the elderly prisoners, and Whitley indicated that he would return with the key. Whitley denied that he spoke to respondent at any time during the disturbance. Tr. 380.

Whitley next consulted with his superiors, petitioners Cupp, the prison Superintendent, and Kenney, the Assistant

Superintendent. They agreed that forceful intervention was necessary to protect the life of the hostage and the safety of the inmates who were not rioting, and ruled out tear gas as an unworkable alternative. Cupp ordered Whitley to take a squad armed with shotguns into cellblock "A."

Whitley gave the final orders to the assault team, which was assembled in the area outside cellblock "A." Petitioner Kennicott and two other officers armed with shotguns were to follow Whitley, who was unarmed, over the barricade the inmates had constructed at the cellblock entrance. A second group of officers, without firearms, would be behind them. Whitley ordered Kennicott to fire a warning shot as he crossed the barricade. He also ordered Kennicott to shoot low at any prisoners climbing the stairs toward cell 201, since they could pose a threat to the safety of the hostage or to Whitley himself, who would be climbing the stairs in an attempt to free the hostage in cell 201.

At about 10:30 p.m., Whitley reappeared just outside the barricade. By this time, about a half hour had elapsed since the earlier breaking of furniture, and the noise level in the cellblock had noticeably diminished. Respondent, who was standing at the bottom of the stairway, asked about the key. Whitley replied "No," clambered over the barricade, yelled "shoot the bastards," and ran toward the stairs after Klenk, who had been standing in the open areaway along with a number of other inmates. Kennicott fired a warning shot into the wall opposite the cellblock entrance as he followed Whitley over the barricade. He then fired a second shot that struck a post near the stairway. Meanwhile, Whitley chased Klenk up the stairs, and shortly thereafter respondent started up the stairs. Kennicott fired a third shot that struck respondent in the left knee. Another inmate was shot on the stairs and several others on the lower tier were wounded by gunshot. The inmates in cell 201 prevented Klenk from entering, and Whitley subdued Klenk at the cell door, freeing the hostage.

As a result of the incident, respondent sustained severe damage to his left leg and mental and emotional distress. He subsequently commenced this action pursuant to 42 U. S. C. § 1983, alleging that petitioners deprived him of his rights under the Eighth and Fourteenth Amendments and raising pendent state law claims for assault and battery and negligence. Many of the facts were stipulated, see Tr. 53–60, but both sides also presented testimony from witnesses to the disturbance and the rescue attempt, as well as from expert witnesses with backgrounds in prison discipline and security. At the conclusion of trial, the District Judge directed a verdict for petitioners. He understood respondent's claim to be based solely on the Eighth Amendment as made applicable to the States by the Fourteenth Amendment. See *Robinson* v. *California*, 370 U. S. 660 (1962). The District Judge held:

> "[D]efendants' use of deadly force was justified under the unique circumstances of this case. Possible alternatives were considered and reasonably rejected by prison officers. The use of shotguns and specifically the order to shoot low anyone following the unarmed Whitley up the stairs were necessary to protect Whitley, secure the safe release of the hostage and to restore order and discipline. Even in hindsight, it cannot be said that defendants' actions were not reasonably necessary." 546 F. Supp. 726, 735 (Ore. 1982).

In the alternative, he held that petitioners were immune from damages liability because the constitutional constraints on the use of force in a prison riot were not clearly established. Finally, the District Judge held that respondent was barred from recovery on his pendent state law claims by virtue of an immunity conferred on public officers by the Oregon Tort Claims Act as to claims arising out of riots or mob actions.

A panel of the Court of Appeals for the Ninth Circuit reversed in part and affirmed in part, with one judge dissenting.

743 F. 2d 1372 (1984). The court held that an Eighth Amendment violation would be established "if a prison official deliberately shot Albers under circumstances where the official, with due allowance for the exigency, knew or should have known that it was unnecessary," *id.*, at 1375, or "if the emergency plan was adopted or carried out with 'deliberate indifference' to the right of Albers to be free of cruel unusual punishment." *Ibid.* The Court of Appeals pointed to evidence that the general disturbance in cellblock "A" was subsiding and to respondent's experts' testimony that the use of deadly force was excessive under the circumstances and should have been preceded by a verbal warning, and concluded that the jury could have found an Eighth Amendment violation. *Id.*, at 1376.

The Court of Appeals also ruled that petitioners could not prevail on their qualified immunity defense, because "[a] finding of deliberate indifference is inconsistent with a finding of good faith or qualified immunity." *Ibid.* Accordingly, the court remanded for a new trial on respondent's Eighth Amendment claim, while agreeing with the District Judge that respondent could not prevail on his state law claims, *id.*, at 1377, and that he had not asserted an independent violation of the Fourteenth Amendment. *Id.*, at 1374, n. 1. We granted certiorari, 472 U. S. 1007 (1985), and now reverse.

II

The language of the Eighth Amendment, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted," manifests "an intention to limit the power of those entrusted with the criminal-law function of government." *Ingraham* v. *Wright*, 430 U. S. 651, 664 (1977). The Cruel and Unusual Punishments Clause "was designed to protect those convicted of crimes," *ibid.*, and consequently the Clause applies "only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions." *Id.*, at 671, n. 40.

See also *Revere* v. *Massachusetts General Hospital,* 463 U. S. 239, 244 (1983); *Bell* v. *Wolfish,* 441 U. S. 520, 535, n. 16 (1979). An express intent to inflict unnecessary pain is not required, *Estelle* v. *Gamble,* 429 U. S. 97, 104 (1976) ("deliberate indifference" to a prisoner's serious medical needs is cruel and unusual punishment), and harsh "conditions of confinement" may constitute cruel and unusual punishment unless such conditions "are part of the penalty that criminal offenders pay for their offenses against society." *Rhodes* v. *Chapman,* 452 U. S. 337, 347 (1981).

Not every governmental action affecting the interests or well-being of a prisoner is subject to Eighth Amendment scrutiny, however. "After incarceration, only the '"unnecessary and wanton infliction of pain"' . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment." *Ingraham* v. *Wright, supra,* at 670 (quoting *Estelle* v. *Gamble, supra,* at 103) (citations omitted). To be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety. This reading of the Clause underlies our decision in *Estelle* v. *Gamble, supra,* at 105–106, which held that a prison physician's "neglige[ce] in diagnosing or treating a medical condition" did not suffice to make out a claim of cruel and unusual punishment. It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock. The infliction of pain in the course of a prison security measure, therefore, does not amount to cruel and unusual punishment simply because it may appear in retrospect that the degree of force authorized or applied for security purposes was unreasonable, and hence unnecessary in the strict sense.

The general requirement that an Eighth Amendment claimant allege and prove the unnecessary and wanton infliction of pain should also be applied with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged. The deliberate indifference standard articulated in *Estelle* was appropriate in the context presented in that case because the State's responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities. Consequently, "deliberate indifference to a prisoner's serious illness or injury," *Estelle, supra*, at 105, can typically be established or disproved without the necessity of balancing competing institutional concerns for the safety of prison staff or other inmates. But, in making and carrying out decisions involving the use of force to restore order in the face of a prison disturbance, prison officials undoubtedly must take into account the very real threats the unrest presents to inmates and prison officials alike, in addition to the possible harms to inmates against whom force might be used. As we said in *Hudson* v. *Palmer*, 468 U. S. 517, 526–527 (1984), prison administrators are charged with the responsibility of ensuring the safety of the prison staff, administrative personnel, and visitors, as well as the "obligation to take reasonable measures to guarantee the safety of the inmates themselves." In this setting, a deliberate indifference standard does not adequately capture the importance of such competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance.

Where a prison security measure is undertaken to resolve a disturbance, such as occurred in this case, that indisputably poses significant risks to the safety of inmates and prison staff, we think the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Johnson* v. *Glick*, 481 F. 2d 1028, 1033 (CA2) (Friendly, J.), cert. denied *sub nom. John* v. *Johnson*, 414 U. S. 1033 (1973). As the District Judge correctly perceived, "such factors as the need for the application of force, the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted," 481 F. 2d, at 1033, are relevant to that ultimate determination. See 546 F. Supp., at 733. From such considerations inferences may be drawn as to whether the use of force could plausibly have been thought necessary, or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur. See *Duckworth* v. *Franzen*, 780 F. 2d 645, 652 (CA7 1985) (equating "deliberate indifference," in an Eighth Amendment case involving security risks, with "recklessness in criminal law," which "implies an act so dangerous that the defendant's knowledge of the risk can be inferred"); cf. *Block* v. *Rutherford*, 468 U. S. 576, 584 (1984) (requiring pretrial detainees claiming that they were subjected to "punishment" without due process to prove intent to punish or show that the challenged conduct "'is not reasonably related to a legitimate goal,'" from which an intent to punish may be inferred); *Bell* v. *Wolfish*, *supra*, at 539. But equally relevant are such factors as the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them, and any efforts made to temper the severity of a forceful response.

When the "ever-present potential for violent confrontation and conflagration," *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U. S. 119, 132 (1977), ripens into *actual* unrest and conflict, the admonition that "a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators," *Rhodes* v. *Chapman*, *supra*, at 349, n. 14, carries special weight. "Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell* v. *Wolfish*, 441 U. S., at 547. That deference extends to a prison security measure taken in response to an actual confrontation with riotous inmates, just as it does to prophylactic or preventive measures intended to reduce the incidence of these or any other breaches of prison discipline. It does not insulate from review actions taken in bad faith and for no legitimate purpose, but it requires that neither judge nor jury freely substitute their judgment for that of officials who have made a considered choice. Accordingly, in ruling on a motion for a directed verdict in a case such as this, courts must determine whether the evidence goes beyond a mere dispute over the reasonableness of a particular use of force or the existence of arguably superior alternatives. Unless it appears that the evidence, viewed in the light most favorable to the plaintiff, will support a reliable inference of wantonness in the infliction of pain under the standard we have described, the case should not go to the jury.

III

Since this case comes to us from a decision of the Court of Appeals reversing the District Court's directed verdict for petitioners, we evaluate the facts in the light most favorable to respondent. The Court of Appeals believed that testimony that the disturbance was subsiding at the time the assault was made, and the conflicting expert testimony as to whether the force used was excessive, were enough to allow a jury to find that respondent's Eighth Amendment rights were violated. We think the Court of Appeals effectively collapsed the distinction between mere negligence and wanton conduct that we find implicit in the Eighth Amendment. Only if ordinary errors of judgment could make out an Eighth Amendment claim would this evidence create a jury question.

To begin with, although the evidence could be taken to show that the general disturbance had quieted down, a guard was still held hostage, Klenk was armed and threatening, several other inmates were armed with homemade clubs, numerous inmates remained outside their cells, and the cellblock remained in the control of the inmates. The situation remained dangerous and volatile. As respondent concedes, at the time he was shot "an officer's safety was in question and . . . an inmate was armed and dangerous." Brief for Respondent 25. Prison officials had no way of knowing what direction matters would take if they continued to negotiate or did nothing, but they had ample reason to believe that these options presented unacceptable risks.

Respondent's expert testimony is likewise unavailing. One of respondent's experts opined that petitioners gave inadequate consideration to less forceful means of intervention, and that the use of deadly force under the circumstances was not necessary to "prevent imminent danger" to the hostage guard or other inmates. Tr. 266. Respondent's second expert testified that prison officials were "possibly a little hasty in using the firepower" on the inmates. *Id.*, at 314. At most, this evidence, which was controverted by petitioners' experts, establishes that prison officials arguably erred in judgment when they decided on a plan that employed potentially deadly force. It falls far short of a showing that there was no plausible basis for the officials' belief that this degree of force was necessary. Indeed, any such conclusion would run counter to common sense, in light of the risks to the life of the hostage and the safety of inmates that demonstrably persisted notwithstanding repeated attempts to defuse the situation. An expert's after-the-fact opinion that danger was not "imminent" in no way establishes that there was no danger, or that a conclusion by the officers that it *was* imminent would have been wholly unreasonable.

Once the basic design of the plan was in place, moreover, it is apparent why any inmate running up the stairs after Captain Whitley, or interfering with his progress towards the hostage, could reasonably be thought to present a threat to the success of the rescue attempt and to Whitley—particularly after a warning shot was fired. A sizable group of inmates, in defiance of the cell-in order and in apparent support of Klenk, continued to stand in the open area on the lower tier. Respondent testified that this was not "an organized group," *id.*, at 113, and that he saw no inmates armed with clubs in that area. *Id.*, at 114. But the fact remains that the officials had no way of knowing which members of that group of inmates had joined with Klenk in destroying furniture, breaking glass, seizing the hostage, and setting up the barricade, and they certainly had reason to believe that some members of this group might intervene in support of Klenk. It was perhaps also foreseeable that one or more of these inmates would run up the stairs after the shooting started in order to return to their cells. But there would be neither means nor time to inquire into the reasons why each inmate acted as he did. Consequently, the order to shoot, qualified as it was by an instruction to shoot low, falls short of commanding the infliction of pain in a wanton and unnecessary fashion.

As petitioners' own experts conceded, a verbal warning would have been desirable, in addition to a warning shot, if circumstances permitted it to be given without undue risk. See *id.*, at 446, 556. While a jury might conclude that this omission was unreasonable, we think that an inference of wantonness could not properly be drawn. First, some warning was given in the form of the first shot fired by Officer Kennicott. Second, the prison officials could have believed in good faith that such a warning might endanger the success of the security measure because of the risk that it would have allowed one or more inmates to climb the stairs before they could be stopped. The failure to provide for verbal warnings is thus not so insupportable as to be wanton. Accordingly, a jury could not properly find that this omission, coupled with the order to shoot, offended the Eighth Amendment.

To be sure, the plan was not adapted to take into account the appearance of respondent on the scene, and, on the facts as we must take them, Whitley was aware that respondent was present on the first tier for benign reasons. Conceivably, Whitley could have added a proviso exempting respondent from his order to shoot any prisoner climbing the stairs. But such an oversight simply does not rise to the level of an Eighth Amendment violation. Officials cannot realistically be expected to consider every contingency or minimize every risk, and it was far from inevitable that respondent would react as he did. Whitley was about to risk his life in an effort to rescue the hostage, and he was understandably focusing on the orders essential to the success of the plan. His failure to make special provision for respondent may have been unfortunate, but is hardly behavior from which a wanton willingness to inflict unjustified suffering on respondent can be inferred.

Once it is established that the order to shoot low at anyone climbing the stairs after a warning shot was not wanton, respondent's burden in showing that the actual shooting constituted the wanton and unnecessary infliction of pain is an extremely heavy one. Accepting that respondent could not have sought safety in a cell on the lower tier, the fact remains that had respondent thrown himself to the floor he would not have been shot at. Instead, after the warning shot was fired, he attempted to return to his cell by running up the stairs behind Whitley. That is equivocal conduct. While respondent had not been actively involved in the riot and indeed had attempted to help matters, there is no indication that Officer Kennicott knew this, nor any claim that he acted vindictively or in retaliation. Respondent testified that as he started to run up the stairs he "froze" when he looked to his left and saw Kennicott, and that "we locked eyes." *Id.*, at 119. Kennicott testified that he saw several inmates running up the stairs, that he thought they were pursuing Whitley, and that he fired at their legs. *Id.*, at 459. To the extent that this testimony is conflicting, we resolve the conflict in respondent's favor by assuming that Kennicott shot at respondent rather than at the inmates as a group. But this does not establish that Kennicott shot respondent knowing it was unnecessary to do so. Kennicott had some basis for believing that respondent constituted a threat to the hostage and to Whitley, and had at most a few seconds in which to react. He was also under orders to respond to such a perceived threat in precisely the manner he did. Under these circumstances, the actual shooting was part and parcel of a good-faith effort to restore prison security. As such, it did not violate respondent's Eighth Amendment right to be free from cruel and unusual punishments.

IV

As an alternative ground for affirmance, respondent contends that, independently of the Eighth Amendment, the shooting deprived him of a protected liberty interest without due process of law, in violation of the Fourteenth Amendment. Respondent correctly observes that any ground properly raised below may be urged as a basis for affirmance of the Court of Appeals' decision, see *United States* v. *New York Telephone Co.*, 434 U. S. 159, 166, n. 8 (1977), and argues that he has maintained throughout this litigation that his "constitutional protection against the use of excessive and unnecessary force, as well as the use of deadly force without meaningful warning," derives from the Due Process Clause as well as the Eighth Amendment. Brief for Respondent 25, n. 13.

The District Court was correct in ruling that respondent did not assert a *procedural* due process claim that the State was obliged to afford him some kind of hearing either before or after he was shot. See 546 F. Supp., at 732, n. 1. But we believe respondent did raise a claim that his "substantive rights under the Due Process Clause of the Fourteenth Amendment," *Youngberg* v. *Romeo*, 457 U. S. 307, 309 (1982), were infringed by prison officials when he was shot. His complaint alleged violations of the Eighth and Fourteenth Amendments, App. 2, 7 (First Amended Complaint), and at argument on petitioners' motion for a directed verdict, counsel for both petitioners and respondents treated the Fourteenth Amendment as a distinct though overlapping source of substantive protection from state action involving excessive force. See *id.*, at 21, 27. Accordingly, we consider whether the Due Process Clause could serve as an alternative basis for affirmance.

We need say little on this score. We think the Eighth Amendment, which is specifically concerned with the unnecessary and wanton infliction of pain in penal institutions, serves as the primary source of substantive protection to convicted prisoners in cases such as this one, where the deliberate use of force is challenged as excessive and unjustified. It would indeed be surprising if, in the context of forceful prison security measures, "conduct that shocks the conscience" or "afford[s] brutality the cloak of law," and so violates the Fourteenth Amendment, *Rochin* v. *California*, 342 U. S. 165, 172, 173 (1952), were not also punishment "inconsistent with contemporary standards of decency" and "'repugnant to the conscience of mankind,'" *Estelle* v. *Gamble*, 429 U. S., at 103, 106, in violation of the Eighth. We only recently reserved the general question "whether something less than intentional conduct, such as recklessness or 'gross negligence,' is enough to trigger the protections of the Due Process Clause." *Daniels* v. *Williams*, 474 U. S. 327, 334, n. 3 (1986). Because this case involves prison inmates rather than pretrial detainees or persons enjoying unrestricted liberty we imply nothing as to the proper answer to that question outside the prison security context by holding, as we do, that in these circumstances the Due Process Clause affords respondent no greater protection than does the Cruel and Unusual Punishments Clause.

Petitioners also ask us to hold that the Court of Appeals erred in ruling that they did not enjoy qualified immunity. We decline to review that holding, because our decision that petitioners were entitled to a directed verdict on the merits makes it unnecessary to do so.

The judgment of the Court of Appeals is

Reversed.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

I share the majority's concern that prison officials be permitted to respond reasonably to inmate disturbances without unwarranted fear of liability. I agree that the threshold for establishing a constitutional violation under these circumstances is high. I do not agree, however, that the contested existence of a "riot" in the prison lessens the constraints imposed on prison authorities by the Eighth Amendment.

The majority has erred, I believe, both in developing its legal analysis and in employing it. First, the especially onerous standard the Court has devised for determining whether a prisoner injured during a prison disturbance has been subjected to cruel and unusual punishment is incorrect and not justified by precedent. That standard is particularly inappropriate because courts deciding whether to apply it must resolve a preliminary issue of fact that will often be disputed and properly left to the jury. Finally, the Court has applied its test improperly to the facts of this case. For these reasons, I must respectfully dissent.

I

The Court properly begins by acknowledging that, for a prisoner attempting to prove a violation of the Eighth Amendment, "[a]n express intent to inflict unnecessary pain is not required, *Estelle* v. *Gamble*, 429 U. S. 97, 104 (1976)." *Ante*, at 319. Rather, our cases have established that the "unnecessary and wanton" infliction of pain on prisoners constitutes cruel and unusual punishment prohibited by the Eighth Amendment, even in the absence of intent to harm. *Ibid.;* see also *Ingraham* v. *Wright*, 430 U. S. 651, 670 (1977); *Gregg* v. *Georgia*, 428 U. S. 153, 173 (1976) (joint opinion of

Stewart, POWELL, and STEVENS, JJ.). Having correctly articulated the teaching of our cases on this issue, however, the majority inexplicably arrives at the conclusion that a constitutional violation in the context of a prison uprising can be established only if force was used "maliciously and sadistically for the very purpose of causing harm," *ante*, at 320–321—thus requiring the very "express intent to inflict unnecessary pain" that it had properly disavowed.[1]

The Court imposes its heightened version of the "unnecessary and wanton" standard only when the injury occurred in the course of a "disturbance" that "poses significant risks," *ante*, at 320. But those very questions—whether a disturbance existed and whether it posed a risk—are likely to be hotly contested. It is inappropriate, to say the least, to condition the choice of a legal standard, the purpose of which is to determine whether to send a constitutional claim to the jury, upon the court's resolution of factual disputes that in many cases should themselves be resolved by the jury.

The correct standard for identifying a violation of the Eighth Amendment under our cases is clearly the "unnecessary and wanton" standard, which establishes a high hurdle to be overcome by a prisoner seeking relief for a constitutional violation. The full circumstances of the plaintiff's injury, including whether it was inflicted during an attempt to quell a riot and whether there was a reasonable apprehension of danger, should be considered by the factfinder in determining whether that standard is satisfied in a particular case. There is simply no justification for creating a distinct and more onerous burden for the plaintiff to meet merely because the judge believes that the injury at issue was caused during a disturbance that "pose[d] significant risks to the safety of inmates and prison staff," *ante*, at 320. Determination of whether there was such a disturbance or risk, when disputed, should be made by the jury when it resolves disputed facts, not by the court in its role as arbiter of law. See *Byrd* v. *Blue Ridge Cooperative*, 356 U. S. 525, 537 (1958).

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[1] This intent standard ostensibly derives from an opinion of Judge Friendly in *Johnson* v. *Glick*, 481 F. 2d 1028, 1033 (CA2), cert. denied *sub nom. John* v. *Johnson*, 414 U. S. 1033 (1973). That opinion, however, considered maliciousness not as a prerequisite to a constitutional violation, but rather as a factor that, if present, could enable a plaintiff to survive a motion to dismiss when otherwise the facts might be insufficient to make out a claim. 481 F. 2d, at 1033.

II

The Court properly begins its application of the law by reciting the principle that the facts must be viewed in the light most favorable to respondent, who won a reversal of a directed verdict below. See *Galloway* v. *United States*, 319 U. S. 372, 395 (1943). If, under any reasonable interpretation of the facts, a jury could have found the "unnecessary and wanton" standard to be met, then the directed verdict was improper. The majority opinion, however, resolves factual disputes in the record in petitioners' favor and discounts much of respondent's theory of the case. This it is not entitled to do.

The majority pays short shrift to respondent's significant contention that the disturbance had quieted down by the time the lethal force was employed. *Ante*, at 322–323. Respondent presented substantial testimony to show that the disturbance had subsided, Tr. 112, 165, 188, 193; that only one prisoner, Klenk, remained in any way disruptive, *id.*, at 212; and that even Klenk had calmed down enough at that point to admit that he had "'gone too far.'" *Id.*, at 117. The majority asserts that "a guard was still held hostage, Klenk was armed and threatening, several other inmates were armed with homemade clubs, numerous inmates remained outside their cells, and . . . [t]he situation remained dangerous and volatile." *Ante*, at 322–323. Respondent's evidence, however, indicated that the guard was not, in fact, in danger. He had been put into a cell by several inmates to prevent Klenk from harming him. Tr. 161. Captain Whitley had been to see the guard, and had observed that the inmates protecting him from Klenk were not armed and had promised to keep Klenk out. *Id.*, at 58 (stipulation), 163. According to respondent's evidence, moreover, no other inmates were assisting Klenk in any way when the riot squad was called in; they were simply "milling around," waiting for Klenk to be taken into custody, or for orders to return to their cells. *Id.*, at 188. Respondent's evidence tended to show not that the "situation remained dangerous and volatile," *ante*, at 323, but, on the contrary, that it was calm. Although the Court sees fit to emphasize repeatedly "the risks to the life of the hostage and the safety of inmates that demonstrably persisted notwithstanding repeated attempts to defuse the situation," *ibid.*, I can only point out that respondent bitterly disputed that any such risk to guards or inmates had persisted. The Court just does not believe his story.

The Court's treatment of the expert testimony is equally insensitive to its obligation to resolve all disputes in favor of respondent. Respondent's experts testified that the use of deadly force under these circumstances was not justified by any necessity to prevent imminent danger to the officers or the inmates, Tr. 266; that the force used was excessive, *ibid.*; and that even if deadly force had been justified, it would have been unreasonable to unleash such force without a clear warning to allow nonparticipating inmates to return to their cells. *Id.*, at 269. Insofar as expert testimony can ever be useful to show that prison authorities engaged in the "unnecessary and wanton" infliction of pain, even though it will always amount to "after-the-fact opinion" regarding the circumstances of the injury, see *ante*, at 323, respondent's expert evidence contributed to the creation of a factual issue.

The majority characterizes the petitioners' error in using deadly force where it was not justified as an "oversight." *Ante*, at 325. This is an endorsement of petitioners' rendition of the facts. As portrayed by respondent's evidence, the "error" was made in cold blood. Respondent's involvement started when, at the request of one of the inmates, he approached petitioner Whitley, who was talking to Klenk, to ask if Whitley would supply a key to a gate so that the elderly and sick patients in so-called "medical cells" near the area of disturbance could be removed before any tear gas was used. Tr. 115–116. Captain Whitley said that he would go and get the key, and left the cellblock. *Ibid.* In two or three minutes, Whitley returned. *Id.*, at 118. Respondent went to the door of the cellblock, and asked Whitley if he had brought the key. Whitley responded "'No,'" turned his head back and yelled: "'Let's go, let's go. Shoot the bastards!'" *Ibid.*

Respondent, afraid, ran from his position by the door and headed for the stairs, the only route back to his cell. *Id.*, at 118–119. He caught some movement out of the corner of his eye, looked in its direction, and saw petitioner Kennicott. According to respondent: "'I froze. I looked at him; we locked eyes, then I looked down and seen the shotgun in his hand, then I seen the flash, and the next thing I know I was sitting down, grabbing my leg.'" *Id.*, at 119. Losing a great deal of blood, respondent crawled up the stairs and fell on his face, trying to get out of range of the shotguns. *Ibid.* After about 10 minutes, an officer grabbed respondent by the hair and dragged him downstairs. *Id.*, at 194. As he lay there, another officer came and stood over respondent and shoved the barrel of a gun or gas pistol into respondent's face. *Id.*, at 122. Respondent was left lying and bleeding profusely for approximately 10 or 15 more minutes, and was then taken to the prison hospital. *Id.*, at 194. He suffered very severe injury. Meanwhile, Klenk had been subdued with no resistance by Whitley, *id.*, at 164, 234, who was unarmed, *id.*, at 233.

Other testimony showed that, although most of the inmates assembled in the area were clearly not participating in the misconduct, they received no warning, instructions, or opportunity to leave the area and return to their cells before the officers started shooting. *Id.*, at 163. Neither respondent nor any other inmate attempted to impede the officers as they entered the cellblock. *Id.*, at 234. The officers were described as "wild," "agitated, excited," not in full control of their emotions. *Id.*, at 192. One officer, prior to entering cellblock "A," told the others to "'shoot their asses off, and if Klenk gets in the way, kill him.'" *Ibid.* At the time of this assault, the cellblock was described as "quiet." *Id.*, at 193.

If a jury credited respondent's testimony and that of his witnesses, it would have believed that there was only one inmate who was temporarily out of control, Klenk—"scared," *id.*, at 165, and "high," *id.*, at 117—and ready to give up. The disturbance in the block had lasted only 15 or 20 minutes when it subsided, and there appeared to be no lasting danger to anyone. Respondent was shot while he stood motionless on the stairs, and was left to bleed for a perilously long time before receiving any assistance.

III

Part III of the Court's opinion falls far short of a rendition of the events in the light most favorable to respondent. In that light, the facts present a very close question as to whether the prison officials' infliction of pain on respondent could be said to display the level of wantonness necessary to make out a constitutional violation. At the very least, it is clear that fair-minded people could differ on the response to that question, and that is all it takes to preclude a directed verdict.

The majority suggests that the existence of more appropriate alternative measures for controlling prison disturbances is irrelevant to the constitutional inquiry, but surely it cannot mean what it appears to say. For if prison officials were to drop a bomb on a cellblock in order to halt a fistfight between two inmates, for example, I feel confident that the Court would have difficulty concluding, as a matter of law, that such an action was not sufficiently wanton to present a jury question, even though concededly taken in an effort to restore order in the prison. Thus, the question of wantonness in the context of prison disorder, as with other claims of mistreatment under the Eighth Amendment, is a matter of degree. And it is precisely in cases like this one, when shading the facts one way or the other can result in different legal conclusions, that a jury should be permitted to do its job. Properly instructed, a jury would take into account the petitioners' legitimate need to protect security, the extent of the danger presented, and the reasonableness of force used, in assessing liability. Moreover, the jury would know that a prisoner's burden is a heavy one, if he is to establish an Eighth Amendment violation under these circumstances.[2] Whether respondent was able to meet that burden here is a question for the jury. From the Court's usurpation of the jury's function, I dissent. I would affirm the judgment of the Court of Appeals.

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[2] The majority also rejects the pure Fourteenth Amendment due process claim asserted by respondent before the District Court. For the reasons stated in JUSTICE BLACKMUN's dissent in *Davidson* v. *Cannon*, 474 U. S. 344, 349 (1986), which I joined, I believe that the evidence precluding a directed verdict under the "unnecessary and wanton" standard also precludes a directed verdict on respondent's due process claim. JUSTICE STEVENS does not join this footnote.

MALLEY ET AL. v. BRIGGS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 84-1586. Argued November 13, 1985—Decided March 5, 1986

On the basis of the monitoring of two telephone calls pursuant to a court-authorized wiretap of the telephone of an acquaintance of respondents' daughter, petitioner Rhode Island state trooper (hereafter petitioner) prepared felony complaints charging respondents with possession of marihuana. The complaints were presented to a state judge, accompanied by arrest warrants and supporting affidavits. The judge signed the warrants and respondents were arrested, but the charges were subsequently dropped when the grand jury did not return an indictment. Respondents then brought a damages action in Federal District Court under 42 U. S. C. § 1983, alleging that petitioner in applying for the arrest warrants violated their rights under the Fourth and Fourteenth Amendments. The case was tried to a jury, and the court, while granting a directed verdict for petitioner on other grounds at the close of respondents' evidence, stated that a police officer who believes that the facts stated in an affidavit are true and submits them to a neutral magistrate may be entitled to immunity under the "objective reasonableness" standard of *Harlow* v. *Fitzgerald*, 457 U. S. 800. The Court of Appeals reversed.

Held: Petitioner is not entitled to absolute immunity but only to qualified immunity from liability for damages. Pp. 339-346.

(a) Neither the common law nor public policy affords any support for absolute immunity. Such immunity cannot be permitted on the basis that petitioner's function in seeking the arrest warrants was similar to that of a complaining witness, since complaining witnesses were not absolutely immune at common law. As a matter of public policy, qualified immunity provides ample protection to all but the plainly incompetent or those who knowingly violate the law. Nor is there any tradition of absolute immunity for a police officer requesting a warrant comparable to that afforded a prosecutor at common law. In the case of an officer applying for a warrant, the judicial process will on the whole benefit from a rule of qualified rather than absolute immunity. The *Harlow* "objective reasonableness" standard, which gives ample room for mistaken judgments, will not deter an officer from submitting an affidavit when there is probable cause to make an arrest, and defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest. Pp. 340–345.

(b) Petitioner cannot avoid liability under the rule of qualified immunity on the grounds that the act of applying for an arrest warrant is *per se* objectively reasonable where the officer believes that the facts alleged in his affidavit are true, and that he is entitled to rely on the judicial officer's judgment in issuing the warrant and hence finding that probable cause exists. The question is whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant. If such was the case, the application for the warrant was not objectively reasonable, because it created the unnecessary danger of an unlawful arrest. Pp. 345–346.

748 F. 2d 715, affirmed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. POWELL, J., filed an opinion concurring in part and dissenting in part, in which REHNQUIST, J., joined, *post*, p. 346.

Ann M. Sheadel, Assistant Attorney General of Rhode Island, argued the cause for petitioners. With her on the brief was *Arlene Violet*, Attorney General.

Leonard Decof, argued the cause for respondents. With him on the brief was *John S. Foley*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Minnesota et al. by *Hubert H. Humphrey III*, Attorney General of Minnesota, and *Catharine F. Haukedahl*, Special Assistant Attorney General, *Charles A. Graddick*, Attorney General of Alabama, *Robert K. Corbin*, Attorney General of Arizona, *John K. Van de Kamp*, Attorney General of California, *Jim Smith*, Attorney General of Florida, *Michael J. Bowers*, Attorney General of Georgia, *Corinne Watanabe*, Acting Attorney General of Hawaii, *Jim Jones*, Attorney General of Idaho, *Linley E. Pearson*, Attorney General of Indiana, *Robert T. Stephan*, Attorney General of Kansas, *William J. Guste, Jr.*, Attorney General of Louisiana, *Frank J. Kelley*, Attorney General of Michigan, *Edwin Lloyd Pittman*, Attorney General of Mississippi, *William L. Webster*, Attorney General of Missouri, *Mike Greely*, Attorney General of Montana, *Robert M. Spire*, Attorney General of Nebraska, *Brian McKay*, Attorney General of Nevada, *Stephen E. Merrill*, Attorney General of New Hampshire, *Irwin I. Kimmelman*, Attorney General of New Jersey, *Lacy H. Thornburg*, Attorney General of North Carolina, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *David*

JUSTICE WHITE delivered the opinion of the Court.

This case presents the question of the degree of immunity accorded a defendant police officer in a damages action under 42 U. S. C. § 1983 when it is alleged that the officer caused the plaintiffs to be unconstitutionally arrested by presenting a judge with a complaint and a supporting affidavit which failed to establish probable cause.

I

In December 1980, the Rhode Island State Police were conducting a court-authorized wiretap on the telephone of one Paul Driscoll, an acquaintance of respondents' daughter. On December 20, the police intercepted a call to Driscoll from an unknown individual who identified himself as "Dr. Shogun." The police logsheet summarizes the call as follows: "General conversation re. a party they went to last night . . . caller says I can't believe I was token *[sic]* in front of Jimmy Briggs—caller states he passed it to Louisa . . . Paul says Nancy was sitting in his lap rolling her thing." App. 78.

Petitioner Edward Malley (hereafter petitioner) was the Rhode Island state trooper in charge of the investigation of Driscoll. After reviewing the logsheet for December 20, petitioner decided that the call from "Dr. Shogun" was incriminating, because in drug parlance "toking" means smoking marihuana and "rolling her thing" refers to rolling a mari-

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Frohnmayer, Attorney General of Oregon, *LeRoy S. Zimmerman*, Attorney General of Pennsylvania, *T. Travis Medlock*, Attorney General of South Carolina, *W. J. Michael Cody*, Attorney General of Tennessee, *David L. Wilkinson*, Attorney General of Utah, *William G. Broaddus*, Attorney General of Virginia, *Bronson C. La Follette*, Attorney General of Wisconsin, and *A. G. McClintock*, Attorney General of Wyoming; and for Americans for Effective Law Enforcement, Inc., et al. by *David Crump, Daniel B. Hales, Fred E. Inbau, Wayne W. Schmidt*, and *James P. Manak*.

Steven P. Lockman, Jack D. Novik, Burt Neuborne, and *Lynette Labinger* filed a brief for the American Civil Liberties Union et al. as *amici curiae*.

huana cigarette. Petitioner also concluded that another call monitored the same day showed that the party discussed by Driscoll and "Dr. Shogun" took place at respondents' house. On the basis of these two calls, petitioner drew up felony complaints charging that respondents and Paul Driscoll "did unlawfully conspire to violate the uniform controlled substance act of the State of Rhode Island by having [marihuana] in their possession . . . ." *Id.*, at 74. These complaints were presented to a State District Court Judge in February 1981, after the wiretap of Driscoll's phone had been terminated. Accompanying the complaints were unsigned warrants for each respondent's arrest, and supporting affidavits describing the two intercepted calls and petitioner's interpretation of them. The judge signed warrants for the arrest of respondents and 20 other individuals charged by petitioner as a result of information gathered through the wiretap.

Respondents were arrested at their home shortly before six o'clock on the morning of March 19, 1981. They were taken to a police station, booked, held for several hours, arraigned, and released. Local and statewide newspapers published the fact that respondents, who are prominent members of their community, had been arrested and charged with drug possession. The charges against repondents were subsequently dropped when the grand jury to which the case was presented did not return an indictment.

Respondents brought an action under 42 U. S. C. § 1983 in the United States District Court for the District of Rhode Island charging, *inter alia*, that petitioner, in applying for warrants for their arrest, violated their rights under the Fourth and Fourteenth Amendments. The case was tried to a jury, and at the close of respondents' evidence, petitioner moved for and was granted a directed verdict.[1] The District

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[1] Respondents' complaint also named the State of Rhode Island as a defendant. At the close of respondents' evidence, Rhode Island moved for and was granted a directed verdict on Eleventh Amendment grounds. Re-

Court's primary justification for directing a verdict was that the act of the judge in issuing the arrest warrants for respondents broke the causal chain between petitioner's filing of a complaint and respondents' arrest. The court also stated that an officer who believes that the facts stated in his affidavit are true and who submits them to a neutral magistrate may thereby be entitled to immunity under the "objective reasonableness" standard of *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982).

The United States Court of Appeals for the First Circuit reversed, holding that an officer who seeks an arrest warrant by submitting a complaint and supporting affidavit to a judge is not entitled to immunity unless the officer has an objectively reasonable basis for believing that the facts alleged in his affidavit are sufficient to establish probable cause. 748 F. 2d 715 (1984). We granted certiorari in order to review the First Circuit's application of the "objective reasonableness" standard in this context. 471 U. S. 1124 (1985). We affirm.

II

Petitioner urges reversal on two grounds: first, that in this context, he is absolutely immune from liability for damages; second, that he is at least entitled to qualified immunity in this case. We reject both propositions and address first the absolute immunity issue.

A

Our general approach to questions of immunity under § 1983 is by now well established. Although the statute on its face admits of no immunities, we have read it "in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Imbler* v. *Pachtman*, 424 U. S. 409, 418 (1976). Our initial inquiry is whether an official claiming immunity under § 1983 can point to a

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spondents have not contested the propriety of the directed verdict for the State.

common-law counterpart to the privilege he asserts. *Tower* v. *Glover*, 467 U. S. 914 (1984). If "an official was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871, the Court next considers whether § 1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions." *Id.*, at 920. Thus, while we look to the common law for guidance, we do not assume that Congress intended to incorporate every common-law immunity into § 1983 in unaltered form.

Our cases also make plain that "[f]or executive officers in general, . . . qualified immunity represents the norm." *Harlow*, *supra*, at 807.[2] Like federal officers, state officers who "seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope." *Butz* v. *Economou*, 438 U. S. 478, 506 (1978).

B

Although we have previously held that police officers sued under § 1983 for false arrest are qualifiedly immune, *Pierson* v. *Ray*, 386 U. S. 547, 557 (1967), petitioner urges that he should be absolutely immune because his function in seeking an arrest warrant was similar to that of a complaining witness. The difficulty with this submission is that complaining witnesses were not absolutely immune at common law. In 1871, the generally accepted rule was that one who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously and without probable cause.[3] Given malice and the lack of probable cause, the complainant enjoyed no immunity. The common law thus affords no support for petitioner.

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[2] *Harlow* was a suit against federal, not state, officials, but as we stated in deciding the case, it is " 'untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials.' " 457 U. S., at 818, n. 30 (quoting *Butz* v. *Economou*, 438 U. S. 478, 504 (1978)).

Nor are we moved by petitioner's argument that policy considerations require absolute immunity for the officer applying for a warrant. As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law. At common law, in cases where probable cause to arrest was lacking, a complaining witness' immunity turned on the issue of malice, which was a jury question.[4] Under the *Harlow* standard, on the other hand, an allegation of malice is not sufficient to defeat immunity if the defendant acted in an objectively reasonable manner. The *Harlow* standard is specifically designed to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment," and we believe it sufficiently serves this goal. Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized.

C

As an alternative ground for claiming absolute immunity, petitioner draws an analogy between an officer requesting a warrant and a prosecutor who asks a grand jury to indict a suspect. Like the prosecutor, petitioner argues, the officer must exercise a discretionary judgment based on the evidence before him, and like the prosecutor, the officer may not exercise his best judgment if the threat of retaliatory lawsuits hangs over him. Thus, petitioner urges us to read § 1983 as giving the officer the same absolute immunity enjoyed by the prosecutor. Cf. *Imbler* v. *Pachtman*, 424 U. S. 409 (1976).

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[3] See, *e. g.*, *Dinsman* v. *Wilkes*, 12 How. 390, 402 (1852); *Randall* v. *Henry*, 5 Stew. & P. 367, 378 (Ala. 1834); *Bell* v. *Keepers*, 37 Kan. 64, 14 P. 542 (1887); *Finn* v. *Frink*, 84 Me. 261, 24 A. 851 (1892); 4 W. Wait, Actions and Defenses 352–356 (1878). The same rule applied in the case of search warrants. See, *e. g.*, *Barker* v. *Stetson*, 73 Mass. 53, 54 (1856); *Carey* v. *Sheets*, 67 Ind. 375, 378–379 (1879).

[4] See 4 Wait, *supra*, at 345 ("Whether malice is proved or not is a question of fact for the jury").

We reemphasize that our role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice, and that we are guided in interpreting Congress' intent by the common-law tradition. In *Imbler*, *supra*, we concluded that at common law "[t]he general rule was, and is, that a prosecutor is absolutely immune from suit for malicious prosecution." *Id.*, at 437. We do not find a comparable tradition of absolute immunity for one whose complaint causes a warrant to issue. See n. 3, *supra*. While this observation may seem unresponsive to petitioner's policy argument, it is, we believe, an important guide to interpreting § 1983. Since the statute on its face does not provide for *any* immunities, we would be going far to read into it an absolute immunity for conduct which was only accorded qualified immunity in 1871.

Even were we to overlook the fact that petitioner is inviting us to expand what was a qualified immunity at common law into an absolute immunity, we would find his analogy between himself and a prosecutor untenable. We have interpreted § 1983 to give absolute immunity to functions "intimately associated with the *judicial* phase of the criminal process," *Imbler*, *supra*, at 430 (emphasis added), not from an exaggerated esteem for those who perform these functions, and certainly not from a desire to shield abuses of office, but because any lesser degree of immunity could impair the judicial process itself. *Briscoe* v. *LaHue*, 460 U. S. 325, 334–335 (1983). We intend no disrespect to the officer applying for a warrant by observing that his action, while a vital part of the administration of criminal justice, is further removed from the judicial phase of criminal proceedings than the act of a prosecutor in seeking an indictment. Furthermore, petitioner's analogy, while it has some force, does not take account of the fact that the prosecutor's act in seeking an indictment is but the first step in the process of seeking a conviction. Exposing the prosecutor to liability for the initial phase of his prosecutorial work could interfere with his exercise of independent judgment at every phase of his work, since the prosecutor might come to see later decisions in terms of their effect on his potential liability. Thus, we shield the prosecutor seeking an indictment because any lesser immunity could impair the performance of a central actor in the judicial process.[5]

In the case of the officer applying for a warrant, it is our judgment that the judicial process will on the whole benefit from a rule of qualified rather than absolute immunity. We do not believe that the *Harlow* standard, which gives ample room for mistaken judgments, will frequently deter an officer from submitting an affidavit when probable cause to make an arrest is present. True, an officer who knows that objectively unreasonable decisions will be actionable may be motivated to reflect, before submitting a request for a warrant, upon whether he has a reasonable basis for believing that his affidavit establishes probable cause. But such reflection is desirable, because it reduces the likelihood that the officer's request for a warrant will be premature. Premature requests for warrants are at best a waste of judicial resources; at worst, they lead to premature arrests, which may injure the innocent or, by giving the basis for a suppression motion, benefit the guilty.

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[5] The organized bar's development and enforcement of professional standards for prosecutors also lessen the danger that absolute immunity will become a shield for prosecutorial misconduct. As we observed in *Imbler*, "a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers." 424 U. S., at 429 (footnote omitted). The absence of a comparably well-developed and pervasive mechanism for controlling police misconduct weighs against allowing absolute immunity for the officer.

Furthermore, it would be incongruous to test police behavior by the "objective reasonableness" standard in a suppression hearing, see *United States* v. *Leon*, 468 U. S. 897 (1984), while exempting police conduct in applying for an arrest or search warrant from any scrutiny whatsoever in a § 1983 damages action.[6] While we believe the exclusionary rule serves a necessary purpose, it obviously does so at a considerable cost to society as a whole, because it excludes evidence probative of guilt. On the other hand, a damages remedy for an arrest following an objectively unreasonable request for a warrant imposes a cost directly on the officer responsible for the unreasonable request, without the side effect of hampering a criminal prosecution. Also, in the case of the § 1983 action, the likelihood is obviously greater than at the suppression hearing that the remedy is benefiting the victim of police misconduct one would think most deserving of a remedy—the person who in fact has done no wrong, and has been arrested for no reason, or a bad reason. See *Owen* v. *City of Independence*, 445 U. S. 622, 653 (1980).

Accordingly, we hold that the same standard of objective reasonableness that we applied in the context of a suppression hearing in *Leon*, *supra*, defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest.[7] Only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable, *Leon, supra,* at 923, will the shield of immunity be lost.

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[6] Although the case before us only concerns a damages action for an officer's part in obtaining an allegedly unconstitutional arrest warrant, the distinction between a search warrant and an arrest warrant would not make a difference in the degree of immunity accorded the officer who applied for the warrant.

[7] Petitioner has not pressed the argument that in a case like this the officer should not be liable because the judge's decision to issue the warrant breaks the causal chain between the application for the warrant and the improvident arrest. It should be clear, however, that the District Court's "no causation" rationale in this case is inconsistent with our interpretation of § 1983. As we stated in *Monroe* v. *Pape*, 365 U. S. 167, 187 (1961),

III

We also reject petitioner's argument that if an officer is entitled to only qualified immunity in cases like this, he is nevertheless shielded from damages liability because the act of applying for a warrant is *per se* objectively reasonable, provided that the officer believes that the facts alleged in his affidavit are true. Petitioner insists that he is entitled to rely on the judgment of a judicial officer in finding that probable cause exists and hence issuing the warrant. This view of objective reasonableness is at odds with our development of that concept in *Harlow* and *Leon*. In *Leon*, we stated that "our good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization." 468 U. S., at 922, n. 23. The analogous question in this case is whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant.[8] If such was the case, the officer's application for a warrant was not objectively reasonable, because it created the unnecessary danger of an unlawful arrest. It is true that in an ideal system an unreasonable request for a warrant would be harmless, because no judge would approve it. But ours is not an ideal system, and it is possible that a magistrate, working under

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§ 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." Since the common law recognized the causal link between the submission of a complaint and an ensuing arrest, we read § 1983 as recognizing the same causal link.

[8] The question is not presented to us, nor do we decide, whether petitioner's conduct in this case was in fact objectively reasonable. That issue must be resolved on remand.

docket pressures, will fail to perform as a magistrate should. We find it reasonable to require the officer applying for the warrant to minimize this danger by exercising reasonable professional judgment.[9]

The judgment of the Court of Appeals is affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE POWELL, with whom JUSTICE REHNQUIST joins, concurring in part and dissenting in part.

Although I agree with much of the Court's opinion, I write separately to emphasize that substantial weight should be accorded the judge's finding of probable cause in determining whether petitioner state trooper (hereafter petitioner) will be personally liable for damages under § 1983. I also believe that summary judgment would have been appropriate here because respondents failed to show that petitioner's decision to request a warrant was not objectively reasonable.

I

At the outset, I supplement the facts stated by the Court. Petitioner was supervising a wiretap in a narcotics investigation pursuant to an order by the Rhode Island Superior

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[9] Notwithstanding petitioner's protestations, the rule we adopt in no way "requires the police officer to assume a role even more skilled . . . than the magistrate." Brief for Petitioners 33. It is a sound presumption that "the magistrate is more qualified than the police officer to make a probable cause determination," *ibid.*, and it goes without saying that where a magistrate acts mistakenly in issuing a warrant but within the range of professional competence of a magistrate, the officer who requested the warrant cannot be held liable. But it is different if no officer of reasonable competence would have requested the warrant, *i. e.*, his request is outside the range of the professional competence expected of an officer. If the magistrate issues the warrant in such a case, his action is not just a reasonable mistake, but an unacceptable error indicating gross incompetence or neglect of duty. The officer then cannot excuse his own default by pointing to the greater incompetence of the magistrate.

Court. It appears from a logged conversation recorded on the wiretap that a "Jimmy Briggs" and a "Luisa *[sic]* Briggs" attended a party where some of those present possessed and used marihuana. A marihuana cigarette may have been passed to Mrs. Briggs. The conversation also referred to a party that was going to be held at respondents' home and attended by some of these people. A fair inference from the log is that respondents were hosting a marihuana party similar to the earlier one.

On the basis of this conversation, petitioner and his partner decided to seek warrants against respondents for possessing marihuana.[1] Petitioner presented the affidavits to Judge Capelli, a Rhode Island District Judge.[2] Judge Capelli reviewed the affidavits, and entered an order stating:

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[1] The State Police successfully sought 20 additional arrest warrants in connection with the narcotics investigation. The record before this Court does not disclose how many of these warrants resulted in indictments.

[2] Trooper Malley's attachment to the affidavit seeking a warrant for the arrest of James R. Briggs stated:

"Your affiant upon oath states that he has reason to believe and does believe that grounds for issuance of an arrest warrant exists *[sic]* and states the following facts on which such belief is founded:

"Persuant *[sic]* to a court ordered wire intercept . . . .

"On December 20, 1980, at 5:30 p.m. an incoming call was received to Paul Driscoll recorded on Reel 7, Side 1, Footage 30–48. This unidentified male calls Paul Driscoll and states, 'This is Doctor Shotgun' *[sic]*. General conversation reference to a party they went to last night. Caller states, 'I can't believe I was token in front of Jimmy Briggs.' Caller states that he passed it to Luisa *[sic]*. Caller and Paul talk about another party going on tonight. Paul says that Nancy was sitting in his lap rolling her thing.

"On the same date at 5:56 p.m., Reel 7, Footage 48–59. Male subject Scott calls Paul Driscoll. General conversation about a party at Jaime's parents' [respondents'] home. Also, that they went there last night. They are referring to Jaime's parents' home, that is James and Luisa Briggs. Further, in regard to the conversation at 5:30 p.m. this unidentified male who called himself Doctor Shotgun *[sic]* stated that he was token in front of Jimmy Briggs. In your affiant's experience, he was smoking a marijuana cigarette in front of James Briggs. He then states that he passed it to Luisa. Luisa would be Luisa Briggs. He passed her a mari-

> "TO ANY AUTHORIZED OFFICER:
>
> "Affidavit (and complaint) having been made to me under oath, and as I am satisfied that there is probable cause for the belief therein set forth that grounds for issuing an arrest warrant exists *[sic]*, you are hereby commanded to arrest the defendant forthwith and to bring him before a judge of this court without unnecessary delay."

The record before us does not disclose any evidence or claim that Judge Capelli failed to act in a competent judicial manner, or that he failed to exercise independent judgment in determining whether the arrest warrant should issue.

Respondents were prominent citizens in the community, and had never previously been implicated in any violation of the criminal laws. The grand jury did not return an indictment against them, and they instituted this suit under § 1983, seeking to hold petitioner personally liable for damages.[3] The District Court directed a verdict for petitioner. It held that Judge Capelli's finding of probable cause and his issuance of the arrest warrants immunized petitioner from respondents' claim for damages.

The Court of Appeals for the First Circuit reversed, holding that liability under § 1983 will attach when "an officer is 'constitutionally negligent,' that is, where the officer should have known that the facts recited in the affidavit did not constitute probable cause." 748 F. 2d 715, 721 (1984). The Court of Appeals also denied petitioner's claim of immunity, purporting to apply the standard of objective reasonableness for qualified immunity articulated in *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982). This Court today affirms.

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juana cigarette. Where Paul states that Nancy was sitting on his lap rolling her thing, she was rolling a marijuana cigarette." App. 72–73.

The statement attached to the affidavit seeking a warrant for the arrest of Louisa Briggs was identical.

[3] Respondents each sought $1 million in compensatory damages and $1 million in punitive damages.

II

I agree with the Court's decision that petitioner was not entitled to absolute immunity, and that the *Harlow* standard of qualified immunity—objective reasonableness—properly applies. In *Harlow*, however, the Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.*, at 818. Putting it differently, we also stated that a claim for qualified immunity "would be defeated [only] if an official '*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff].'" *Id.*, at 815, quoting *Wood* v. *Strickland*, 420 U. S. 308, 322 (1975).

At one point in the Court's opinion today, it correctly recognizes that as the "qualified immunity defense has evolved, it provides ample protection to all but the *plainly incompetent or those who knowingly violate the law.*" *Ante*, at 341 (emphasis added). The Court also says that liability will attach "if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." *Ibid.*

I agree with the foregoing characterizations of the applicable standard when an official raises the defense of qualified immunity. I disagree, however, with the Court in two major respects. First, rather than deciding whether petitioner's conduct met the foregoing standard, the Court remands for trial on this issue. Yet, as the Court recognizes, unless "no reasonably competent officer would have concluded that a warrant should issue," *ibid.*, petitioner should be immune from damages. *Ibid.* In my view, in the light of the logs of the duly authorized wiretap, a reasonably competent officer could have believed that a warrant should issue.

It is undisputed that wiretaps initiated as part of a drug investigation revealed that respondents had attended a party where marihuana was being smoked, that a marihuana cigarette may have been passed to Mrs. Briggs,[4] and that another party—at least inferentially of a similar type—was to be held in respondents' home. Under the *Harlow* standard, we need not consider whether this information would be viewed by *every* reasonable officer as sufficient evidence of probable cause for the issuance of a warrant. Police often operate "in the midst and haste of a criminal investigation," *United States* v. *Ventresca*, 380 U. S. 102, 108 (1965), and they have to make judgment calls over which reasonable officers could differ. In this case, the logs from the wiretap at least arguably implicated respondents in unlawful activities. See *supra*, at 347, and n. 1. Under these circumstances, an officer of reasonable competence could have believed that the wiretap provided probable cause to arrest respondents.

Second, and perhaps of greater importance, in determining whether the police officer acted with objective reasonableness, the Court apparently would give little evidentiary weight to the finding of probable cause by a magistrate or judicial officer.[5] The Court quotes from *United States* v.

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[4] Although the affidavit from Trooper Malley stated that a marihuana cigarette was passed to Mrs. Briggs, the call log simply states that the caller "passed it to Louisa." *Id.*, at 78. A subsequent call to Driscoll mentioned a "Louisa (Bungershort)," probably in connection with the same party. *Ibid.* It is possible that the marihuana cigarette was passed to Louisa Bungershort rather than Louisa Briggs. At trial, Mrs. Briggs denied seeing any marihuana at that party or receiving a marihuana cigarette. *Id.*, at 40.

[5] The words "magistrate" and "judicial officer" often are used interchangeably in Court opinions. *Shadwick* v. *City of Tampa*, 407 U. S. 345 (1972). The Court's emphasis on magistrates has "been directed at the

Leon, 468 U. S. 897, 922, n. 23 (1984), that "'our good-faith inquiry is *confined* to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization.'" *Ante*, at 345 (emphasis added). Although this quotation does not foreclose some consideration by the District Court of the judge's judicial decision, the Court seems to denigrate the relevance of the judge's determination of probable cause and his role in the issuance of a warrant.[6] In my view, the Court misconstrues the respective roles of, and the relationship between, the police officer and the magistrate or judicial officer. In cases where a criminal defendant has asserted claims of unconstitutional search and seizure, this Court has consistently accorded primary evidentiary weight to a magistrate's determination of probable cause.[7] No rea-

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need for independent, neutral, and detached judgment, not at legal training." *North* v. *Russell*, 427 U. S. 328, 337 (1976).

[6] The Court observes that "ours is not an ideal system," and states that "it is possible that a magistrate, working under docket pressures, will fail to perform as a magistrate should." *Ante*, at 345–346. While I do not question the possibility that some magistrates in some cases may "fail to perform as a magistrate should," no one suggests that such is the case here.

The Court previously has stated that "[i]f a magistrate serves merely as a 'rubber stamp' for the police or is unable to exercise mature judgment, closer supervision or removal provides a more effective remedy than the exclusionary rule." *United States* v. *Leon*, 468 U. S., at 917–918, n. 18. I also believe that closer supervision or removal provides a more effective remedy than personal liability for police officers.

[7] In *United States* v. *Ventresca*, 380 U. S. 102, 105–106 (1965), the Court stated:

"We begin our analysis of [the Fourth Amendment] mindful of the fact that in this case a search was made pursuant to a search warrant. . . .

. . . . .

"In *Jones* v. *United States*, 362 U. S. 257, 270, this Court, strongly supporting the preference to be accorded searches under a warrant, indicated that in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall. In *Johnson* v. *United States*, 333 U. S. 10, and *Chapman* v. *United States*, 365 U. S. 610, the Court, in condemning searches by officers who invaded premises without a warrant, son has been articulated by the Court, and certainly none occurs to me, why less weight should be accorded the magistrate's decision in a § 1983 damages suit against the police officer who applied for the warrant.

Our common law has long recognized a "reasonable division of functions," *Baker* v. *McCollan*, 443 U. S. 137, 145 (1979), in law enforcement: the gathering of information is the province of the police, and the weighing and judging of that information is virtually the exclusive province of the magistrate. As Lord Mansfield stated two centuries ago: "It is not fit that the receiving or judging of the information should be left to the discretion of the officer. The magistrate ought to judge; and should give certain directions to the officer." *Leach* v. *Three of the King's Messengers*, 19 How. St. Tr. 1001, 1027 (1765), quoted in *United States* v. *United States District Court*, 407 U. S. 297, 316 (1972).

We have affirmed that the arrest warrant "should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify [issuance of a warrant]." *United States* v. *United States District Court, supra*, at 316. This Court also has recognized that "the informed and deliberate determinations of magistrates . . . are to be preferred over the hurried actions of officers." *United States* v. *Lefkowitz*, 285 U. S. 452, 464 (1932). Judicial evaluation of probable cause by a magistrate is the essential "checkpoint between the Government and the citizen." *Steagald* v. *United States*,

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plainly intimated that had the proper course of obtaining a warrant from a magistrate been followed and had the magistrate on the same evidence available to the police made a finding of probable cause, the search under the warrant would have been sustained."

Generally, the judicial officer's determination of probable cause has greater reliability than a police officer's, not only because the judicial officer is not immersed in the criminal investigation, but also because the judicial officer usually has greater time for deliberation and greater familiarity through training or education with the legal concepts concerning probable cause.

451 U. S. 204, 212 (1981). As we stated in *Arkansas* v. *Sanders*, 442 U. S. 753, 759 (1979):

> "The prominent place the warrant requirement is given in our decisions reflects the 'basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government.' *United States* v. *United States District Court, supra,* at 317. By requiring that conclusions concerning probable cause and the scope of a search 'be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime,' *Johnson* v. *United States,* 333 U. S. 10, 14 (1948), we minimize the risk of unreasonable assertions of executive authority."[8]

The police, where they have reason to believe probable cause exists, should be encouraged to submit affidavits to judicial officers.[9] I therefore believe that in a suit such as this, the Court should expressly hold that the decision by the magistrate is entitled to substantial evidentiary weight. A more restrictive standard will discourage police officers from seeking warrants out of fear of litigation and possible personal liability. The specter of personal liability for a mistake in judgment may cause a prudent police officer to close his eyes to facts that should at least be brought to the attention of the judicial officer authorized to make the decision whether a warrant should issue. Law enforcement is ill-served by this *in terrorem* restraint.

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[8] There will, of course, be instances where "it is plainly evident that a magistrate or judge ha[s] no business issuing a warrant." *Illinois* v. *Gates,* 462 U. S. 213, 264 (1983) (WHITE, J., concurring in judgment). If the magistrate has wholly abandoned his judicial role in the manner condemned in *Lo-Ji Sales, Inc.* v. *New York,* 442 U. S. 319 (1979), then the magistrate's approval of a warrant would not necessarily be probative of whether an officer's request for a warrant was objectively reasonable.

[9] It is of course true that actions by police must comport with the Constitution. Police departments and prosecutors have an obligation to instill this understanding in officers, and to discipline those found to have violated the Constitution.

III

This Court has long sought to divide the functions of law enforcement to impose on the magistrate the primary responsibility for determining whether a warrant will issue. It is inconsistent with this jurisprudence to imply or hold that the magistrate's determination of probable cause is irrelevant in this suit. A judicial officer's "judgment call" in determining probable cause, although not conclusive, is entitled to substantial evidentiary weight in suits seeking to impose personal liability on the police officer. In this case, in the light of the judge's determination and the evidence of illegal activity, I would hold that petitioner is immune from damages.

I agree with the judgment declining to accord absolute immunity to the officer seeking a warrant, but I do not join the Court's opinion, and I dissent from the decision to remand this case for trial on the immunity issue.

EXXON CORP. ET AL. *v.* HUNT, ADMINISTRATOR OF NEW JERSEY SPILL COMPENSATION FUND, ET AL.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

No. 84-978. Argued December 9, 1985—Decided March 10, 1986

The New Jersey Spill Compensation and Control Act (Spill Act), enacted in 1977 to respond to the problem of hazardous substance release, imposes an excise tax upon major petroleum and chemical facilities within the State to finance the prevention and cleanup of oil spills and leaks of hazardous chemicals from disposal sites. The tax revenue goes into a permanent fund (Spill Fund), which may spend money not only to clean up releases of hazardous substances, but also to compensate third parties for certain economic losses sustained as a result of such releases, and to pay administrative and research costs. The federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), enacted in response to similar concerns, imposes an excise tax on petroleum and other specified chemicals and establishes a trust fund (Superfund) that may be used to clean up hazardous substance releases and for certain other purposes. CERCLA does not cover oil spills; nor is Superfund money available to compensate private parties for economic harms that result from hazardous substance releases. Superfund money may be used to reimburse private parties only for their cleanup activities that are expressly authorized by the Federal Government; to finance Federal or State Government expenses for short-term cleanup or for measures to achieve a permanent remedy to a particular hazardous waste problem; and to compensate those governments for damages to their natural resources. Appellant corporations, having paid the Spill Act tax, brought suit in the New Jersey Tax Court against appellees (the State and certain of its officials), seeking a tax refund and a declaratory judgment that the New Jersey tax was invalid in its entirety as being pre-empted under § 114(c) of CERCLA, which provides: "Except as provided in this chapter, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this subchapter." Section 114(c) also contains a saving provision stating that nothing in § 114(c) shall be interpreted to prevent a State from using general revenues for such a fund or from imposing a special tax to purchase or locate equipment or otherwise prepare for a response to hazardous substance releases. The court entered summary judgment for appellees, and the Appellate Division of the New Jersey Superior Court affirmed. The New Jersey Supreme Court also affirmed, holding that the Spill Fund tax was not pre-empted by § 114(c) insofar as the Spill Fund "is used to compensate hazardous-waste cleanup costs and related claims that are either not covered or not actually paid under Superfund."

Held:

1. The words "costs of response or damages or claims" in § 114(c) are to be read as a unit, and the entire phrase is modified by the phrase "which may be compensated under this subchapter," thus pre-empting any special state tax fund used to reimburse either a State or a third party for cleanup expenses. An interpretation of those terms so as to include only a private party's cleanup expenses, and so as to permit state-fund expenditures for all state-government cleanup efforts is not supported by CERCLA's history or the wording of other provisions of CERCLA, particularly the saving provision of § 114(c) which, in authorizing special state taxes to pay for the State's preparations for responding to hazardous substance releases, would be redundant if the pre-emption provision did not cover direct governmental expenditures at all. Pp. 363–370.

2. Section 114(c)'s phrase "which may be compensated under this subchapter" is to be interpreted as pre-empting any state fund that is intended, in whole or in part, to pay for the same types of expenses that may be paid by Superfund, and not as covering only expenses that are actually paid by Superfund. Pp. 370–371.

3. Neither the structure nor the legislative history of CERCLA supports appellees' contention that although § 114(c) is not restricted to cases in which Superfund actually disburses money, it applies only when Superfund pays a claim or *would have* paid the claim had it not already been paid by a state fund. Remedying the Nation's toxic waste problems as effectively as possible was not the sole policy choice reflected in CERCLA. Congress' decision to enact a pre-emption provision resulted in part from its concern about the potentially adverse effects of overtaxation on the competitiveness of the American petrochemical industry. That consideration cautions against concluding that Congress would not have wanted to hinder state attempts to clean up hazardous substances in any way. Nor is there sufficient support in § 114(c)'s language or history to accept appellees' contention that in view of the limited availability of Superfund money, only projects that have been actually approved, or are almost certain to be approved, can be termed "eligible" for Superfund financing, and then only to the extent of the approved funding. Pp. 371–374.

4. The National Contingency Plan—which CERCLA requires to be revised annually to list sites most in need of federal efforts—provides

the appropriate measure of whether a given expenditure constitutes "costs of response or damages or claims which may be compensated" by Superfund. Since CERCLA also provides that a State must agree to pay at least 10% of the cost of any remedial action for a hazardous site within the State, such state share is not eligible for Superfund money and thus is not a cost that "may be compensated" for purposes of § 114(c). Under the above-stated principles, use of the New Jersey Spill Fund to compensate third parties for damage resulting from hazardous substance discharges, to pay personnel and equipment costs, to administer the fund, and to conduct research is beyond the scope of CERCLA, and therefore not pre-empted by § 114(c). However, use of the Spill Fund to finance state governmental cleanup (except the 10% state share of remedial costs) and to reimburse third parties for cleanup costs is pre-empted, so long as such efforts occur at sites that are eligible for Superfund financing according to the terms of the National Contingency Plan. Pp. 374–376.

97 N. J. 526, 481 A. 2d 271, affirmed in part, reversed in part, and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, *post,* p. 377. POWELL, J., took no part in the consideration or decision of the case.

Daniel M. Gribbon argued the cause for appellants. With him on the briefs were *John J. Carlin, Jr.*, and *E. Edward Bruce.*

Mary C. Jacobson, Deputy Attorney General of New Jersey, argued the cause for appellees. With her on the brief were *Irwin I. Kimmelman,* Attorney General, and *Michael R. Cole,* First Assistant Attorney General.*

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*A brief of *amicus curiae* urging reversal was filed for the United States by *Solicitor General Lee, Assistant Attorney General Habicht, Deputy Solicitor General Claiborne, Samuel A. Alito, Jr., Robert L. Klarquist,* and *Dirk N. Snel.*

A brief of *amici curiae* urging affirmance was filed for the State of California et al. by *John K. Van de Kamp,* Attorney General of California, *Theodora Berger*, Assistant Attorney General, *Reed Sato,* Deputy Attorney General, *Joseph I. Lieberman,* Attorney General of Connecticut, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *James E. Tierney,* Attorney General of Maine, *Stephen E. Merrill,* Attorney General of New Hampshire, *Robert Abrams*, Attorney General of New York, *Jim Mattox*, JUSTICE MARSHALL delivered the opinion of the Court.

The question for our determination is whether § 114(c) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 94 Stat. 2796, 42 U. S. C. § 9614(c), pre-empts the New Jersey Spill Compensation and Control Act, N. J. Stat. Ann. §§ 58:10-23.11 to 58:10-23.11z (West 1982 and Supp. 1985) (Spill Act). We conclude that the Spill Act is pre-empted in part.

I

A

In 1977 the New Jersey Legislature enacted the Spill Act to respond to the problem of hazardous substance release. Finding that oil spills threatened the health and beauty of the State's natural resources, and that leaks of hazardous chemicals from disposal sites presented a great risk to the public, the legislature intended the Spill Act to protect the citizens and environment of New Jersey through prevention and cleanup of spills and other releases. Those efforts are financed by an excise tax levied upon major petroleum and chemical facilities within the State. The money collected goes into a permanent fund known as the "Spill Fund." The Spill Fund may spend money to clean up releases of hazardous substances, to compensate third parties for certain economic losses sustained as a result of such releases, and to pay administrative and research costs. N. J. Stat. Ann. § 58:10-23.11o (West Supp. 1985).[1]

Attorney General of Texas, and *Jeffrey L. Amestoy*, Attorney General of Vermont.

[1] The compensation for third-party economic loss is broad. The Spill Fund is strictly liable to any party that suffers direct or indirect economic damage from releases of hazardous substances, including (1) damage to any real or personal property, (2) damage to natural resources, (3) loss of income or earning capacity, in certain circumstances, (4) loss of property tax revenue by the State or a local government for one year following the discharge, and (5) interest incurred on loans to ameliorate the effects of a

In 1980 Congress enacted CERCLA in response to similar concerns. CERCLA imposes an excise tax on petroleum and other specified chemicals. The Act establishes a trust fund, commonly known as "Superfund," 87.5% of which is financed through the excise tax, and the remainder through general revenues. Superfund money may be used to clean up releases of hazardous substances and for certain other purposes.[2] Unlike the Spill Act, CERCLA does not include oil spills within its definition of hazardous substance releases, nor is Superfund money available to compensate private parties for economic harms that result from discharges of hazardous substances. Rather, it seeks to facilitate government cleanup of hazardous waste discharges and prevention

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discharge pending reimbursement by the Spill Fund. N. J. Stat. Ann. § 58.10–23.11g (West 1982).

[2] Title 42 U. S. C. § 9611(a) provides:

"The President shall use the money in the Fund for the following purposes:

"(1) payment of governmental response costs incurred pursuant to section 9604 of this title, including costs incurred pursuant to the Intervention on the High Seas Act;

"(2) payment of any claim for necessary response costs incurred by any other person as a result of carrying out the national contingency plan established under section 1321(c) of title 33 and amended by section 9605 of this title: *Provided, however,* That such costs must be approved under said plan and certified by the responsible Federal official;

"(3) payment of any claim authorized by subsection (b) of this section [providing for reimbursement to the Federal and State Governments for damage to natural resources under their respective control] and finally decided pursuant to section 9612 of this title, including those costs set out in subsection 9612(c)(3) of this title [providing for recovery by Fund of interest, costs, and attorney's fees in action against any person liable to the claimant or to the Fund]; and

"(4) payment of costs specified under subsection (c) of this section [providing for research, restoration or replacement of natural resources, prevention of releases, equipment and overhead, and administrative costs].

"The President shall not pay for any administrative costs or expenses out of the Fund unless such costs and expenses are reasonably necessary for and incidental to the implementation of this subchapter."

of future releases. There are two primary purposes for which the Superfund money may be spent—to finance "governmental response," and to pay "claims." See § 111(a) of CERCLA, 42 U. S. C. § 9611(a). Governmental response consists of "removal," or short-term cleanup, § 9601(23), and "remedial action," or measures to achieve a "permanent remedy" to a particular hazardous waste problem, § 9601(24).[3] Claims are demands for reimbursement made upon the Superfund, and also come in two types. One type of claim is a demand by "any other person" for costs incurred pursuant to the federal plan for cleanup of hazardous substances, known as the "national contingency plan." § 9611(a)(2).[4] Thus, Superfund may reimburse private parties only to the extent that their cleanup activities are expressly authorized by the Federal Government. The second type of claim is a demand by the Federal or a State Government for compensation for damages to natural resources belonging to that government. § 9611(a)(3). Superfund money may not be used to pay for injury to persons or property caused by hazardous wastes, except for payment to the Federal and State Governments for their natural resource losses.

This litigation concerns § 114(c) of CERCLA, as set forth in 42 U. S. C. § 9614(c), which provides:

> "Except as provided in this chapter, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated

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[3] Section 104 of CERCLA, 42 U. S. C. § 9604, which sets out procedures for governmental response to hazardous substance releases, provides that state and local governments, as well as the Federal Government, may be delegated by the President to undertake appropriate measures and receive reimbursement from Superfund. It appears, therefore, that the term "governmental response costs" in § 9611(a)(1), see n. 2, *supra*, refers to Federal, State, and local Government.

[4] Because paragraph (1) of 42 U. S. C. § 9611(a) apparently applies to any governmental entity, see n. 3, *supra*, the phrase "any other person" in paragraph (2) of that subsection must denote any nongovernmental entity.

> under this subchapter. Nothing in this section shall preclude any State from using general revenues for such a fund, or from imposing a tax or fee upon any person or upon any substance in order to finance the purchase or prepositioning of hazardous substance response equipment or other preparations for the response to a release of hazardous substances which affects such State."

Clearly, this provision is meant to forbid the States to impose taxes to finance certain types of funds. The issue in this case is whether the New Jersey Spill Fund is, in whole or in part, the type of fund that § 114(c) pre-empts.

B

Appellants are corporations that have paid the Spill Act tax since its inception. After unsuccessful attempts to litigate the issue in the federal courts, see *Exxon Corp.* v. *Hunt*, 683 F. 2d 69 (CA3 1982), cert. denied, 459 U. S. 1104 (1983); cf. *New Jersey* v. *United States*, 16 ERC 1846 (DC 1981) (dismissing suit brought by New Jersey seeking to have tax declared valid),[5] appellants brought suit in the New Jersey Tax Court against New Jersey and certain of its officials (collectively New Jersey), seeking a declaratory judgment and a refund of taxes paid pursuant to the Spill Act. Appellants claimed that the New Jersey tax was invalid in its entirety under § 114(c) and the Supremacy Clause. The Tax Court entered summary judgment for New Jersey on two alternative grounds. First, the court concluded that § 114(c) does not pre-empt state funds that pay cleanup costs and other claims that are not actually compensated by Superfund. Second, even accepting appellants' argument that § 114(c) precludes any state taxation of industry to pay for cleanup and remedial activities, the court found that there were sufficient nonpre-empted purposes to the Spill Fund to make the Fund valid in its entirety. 4 N. J. Tax 294 (1982).

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[5] A member of the New Jersey Legislature also brought suit against the United States seeking to have the Spill Act declared valid. The parties settled the litigation, stipulating that New Jersey could spend Spill Fund money for seven enumerated purposes, including compensation for response costs and damages that are eligible for Superfund compensation but are not actually compensated. See *Lesniak* v. *United States*, 17 ERC 1456 (NJ 1982). Appellants, of course, were not parties to that settlement.

The Appellate Division of the New Jersey Superior Court affirmed, 190 N. J. Super. 131, 462 A. 2d 193 (1983), as did the New Jersey Supreme Court, 97 N. J. 526, 481 A. 2d 271 (1984). The latter court, like the Tax Court, concluded that "the Spill Fund tax . . . is not preempted by section 114(c) of Superfund insofar as Spill Fund is used to compensate hazardous-waste cleanup costs and related claims that are either not covered or not actually paid under Superfund." *Id.*, at 544, 481 A. 2d, at 281. We noted probable jurisdiction, 472 U. S. 1015 (1985), and we now affirm in part and reverse in part.[6]

II

This is an express pre-emption case; appellants claim that the plain language of § 114(c) forbids state taxation of the type the Spill Act imposes. When a federal statute unambiguously precludes certain types of state legislation, we need go no further than the statutory language to determine whether the state statute is pre-empted. *Aloha Airlines, Inc.* v. *Director of Taxation*, 464 U. S. 7, 12 (1983).

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[6] CERCLA was a temporary experiment; by its terms, the Federal Government's authority to collect the excise tax and to appropriate general revenues for Superfund expired on September 30, 1985. 42 U. S. C. §§ 9653, 9631(b)(2). The Congress is currently considering legislation that would extend CERCLA for another five years. See H. R. 2005, 99th Cong., 1st Sess. (1985), passed by the Senate, see 131 Cong. Rec. 25090–25091 (1985), and H. R. 2817, 99th Cong., 1st Sess. (1985), inserted into H. R. 2005, 99th Cong., 1st Sess. (1985), passed by the House, see 131 Cong. Rec. 35626 (1985). As passed, both the Senate and House bills eliminate § 114(c). See S. 51, § 135; H. R. 2005, § 147. Of course, appellants' claims for a refund of taxes paid through September 30, 1985, are unaffected by the expiration of CERCLA or by any changes in the law after that date.

Section 114(c), unfortunately, is not a model of legislative draftsmanship. The critical language, "no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this subchapter," is at best inartful and at worst redundant. As just one example, it is not clear whether "which may be compensated under this subchapter" modifies only the word "claims" which immediately precedes it, or the entire phrase "any costs of response or damages or claims." Because the terms "claims," "response," and "damages" have specific, technical definitions under CERCLA, the way the sentence is parsed may have a significant effect on its meaning. Finally, § 114(c) by itself does not provide a method for determining whether a particular expenditure "may be compensated" by Superfund. That determination, therefore, necessitates reference to the remainder of CERCLA.

III

Our task, then, must proceed in three parts. First, we must determine what class of expenses is encompassed within the phrase "costs of response or damages or claims." Then, because at least some of those expenses are covered by § 114(c) only to the extent that they "may be compensated" by Superfund, we must determine the meaning of that phrase as well. Finally, if we find an overlap between § 114(c)'s prohibitions and the Spill Act's provisions, we must hold the latter pre-empted.

A

Both parties agree as to the first question. Each concludes that the words "costs of response or damages or claims" are to be read as a unit, and the entire phrase is modified by the phrase "which may be compensated under this subchapter." However, the Solicitor General, appearing on behalf of the United States as *amicus curiae,* adopts a contrary position. He contends that § 114(c) should be read to prohibit funds whose purpose is to pay "compensation for [a] claims for any costs of response or damages[,] or [b] claims which may be compensated under this subchapter." Under the Solicitor General's view, therefore, any expense that fits CERCLA's definitions of a "claim" for "costs of response" or "damages" may not be paid by a state fund supported by special taxes, whether or not that expenditure "may" be paid by Superfund.[7] Because "costs of response" covers essentially the entire spectrum of cleanup expenses, see 42 U. S. C. § 9604, the Solicitor General's reading of the pre-emptive scope of § 114(c) might seem very broad at first reading.

The wide sweep of the Solicitor General's position, however, is tempered considerably by his interpretation of the term "claim." CERCLA defines a "claim" as "a demand in writing for a sum certain." § 9601(4). Under the Solicitor General's view, only a private party's demand upon a state fund or Superfund for reimbursement for that party's own cleanup expenses constitutes a "claim." Any State or Federal Government use of a special fund is merely a governmental expenditure, and not the payment of a "claim." Because each of the two clauses created by the Solicitor General's parsing of § 114(c) begins with the word "claims," he argues, that section does not prohibit *any* state fund expenditures for a state government's own cleanup efforts. It prohibits only expenditures to reimburse private parties. Were we to accept the Solicitor General's reading of § 114(c), therefore, New Jersey could freely tax appellants to pay for its own cleanup costs, even if Superfund might otherwise pay those costs. New Jersey could not, however, tax appellants to pay for third-party cleanup costs, whether or not Superfund might bear those costs. Similarly, New Jersey could not use the Spill Fund to pay for any party's "damages," defined by CERCLA to mean loss of natural resources, even though Superfund covers only "damages" suffered by governments.

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[7] An example of a "cost of response" that would not be eligible for Superfund compensation would be the cost of a private party's cleanup efforts if that party did not receive prior authorization from the Federal Government or its agent, see 42 U. S. C. § 9611(a)(2). Under the Solicitor General's reading of § 114(c), a state fund could not reimburse those costs even though it is clear that they would not be eligible for Superfund money.

The United States is not a party, of course, and all parties before us disagree with the Solicitor General's reading of the statute. However, the Solicitor General's view has considerable logical force, and assessing it will prove helpful in evaluating the parties' positions on issues as to which they disagree. Although we ultimately reject the Solicitor General's position, therefore, we find it helpful to analyze it in some detail.

One problem with the Solicitor General's view is that the distinction between a government's own cleanup costs, on the one hand, and "claims," on the other, has not been so consistent throughout CERCLA's history as the Solicitor General suggests. The 96th Congress fully considered three major hazardous substance response bills—H. R. 85, H. R. 7020, and S. 1480—in addition to the Carter administration bill, S. 1341, which died in Committee. See 1 The Environmental Law Institute, Superfund: A Legislative History xiii (1983) (hereafter Leg. Hist.).[8] The earliest of these, H. R.

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[8] Bill H. R. 85, 96th Cong., 1st Sess., was introduced on January 15, 1979, by Representative Biaggi. After consideration in Committee, the bill was reported to the full House, see H. R. Rep. No. 96–172 (1979), but it ran into opposition from the oil and chemical industries. A substitute bill, introduced by Representative Breaux as an amendment to H. R. 85, was considered and passed by the full House. 126 Cong. Rec. 26391 (1980). The bill as passed created two funds financed from taxes on petroleum and chemical feedstocks. One fund was to provide compensation for oil spills and the other for hazardous chemical spills in navigable waters; the bill did not cover hazardous substance releases on land. The bill entitled governments and individuals to recover damages for cleanup costs and

85, had a pre-emption provision resembling § 114(c). Section 110 of the bill as passed by the House provided: "no person may be required to contribute to any fund, the purpose of which is to compensate for a loss which is a compensable damage" under that bill.[9]

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certain economic losses, and imposed strict liability on owners and operators of vessels and other facilities.

Representative Florio introduced H. R. 7020, 96th Cong., 2d Sess., on April 2, 1980. The bill was reported out of Committee, see H. R. Rep. No. 96–1016 (1980), and enacted by the House, 126 Cong. Rec. 26799 (1980). The bill created a fund financed from a tax on oil and chemicals and from general revenues. The fund was to support government response to releases of hazardous substances, including oil, from inactive hazardous waste sites; it did not cover spills in navigable waters, nor did it provide for compensation for economic losses.

The most ambitious of the bills, S. 1480, 96th Cong., 1st Sess., was introduced by Senators Culver, Muskie, Stafford, Chafee, Randolph, and Moynihan on July 11, 1979. It was favorably reported, see S. Rep. No. 96–848 (1980). As reported, the bill provided for a $4 billion fund from general revenues and fees on petroleum and chemicals, and for strict liability for a broad range of persons responsible for releases of hazardous chemicals (not including oil). The liability and compensation provisions covered cleanup costs and a variety of private damages, including medical expenses.

As all three bills reached the Senate, S. 1480 was attacked as too comprehensive and H. R. 85 and H. R. 7020 as too weak. Eventually the Senate passed a substitute bill, see *infra*, at 368, as an amendment to H. R. 7020. The new H. R. 7020 was enacted by both Houses, and signed into law on December 11, 1980. Pub. L. 96–510, 94 Stat. 2767. See 1 Leg. Hist. xiii–xxi; see also Senate Committee on Environment and Public Works, A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund), 97th Cong., 2d Sess. (Comm. Print 1983); Grad, A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980, 8 Colum. J. Env. L. 1 (1982).

[9] As discussed in n. 8, *supra*, H. R. 85 as passed by the House provided for two funds, one to cover oil spills and the other to cover hazardous chemical spills. Section 110 applied to the oil spill fund only. Section 302 of H. R. 85 applied to the chemical spill fund, and is worded identically to § 110. We will hereafter use "§ 110" to refer to both pre-emption provisions.

The Solicitor General argues that § 110 had a purpose similar to that which he finds in § 114(c).[10] The sort of loss contemplated by the quoted language, he contends, is a loss suffered by nongovernmental entities, and not a state expenditure. This argument, however, misperceives the overall structure of H. R. 85. That bill defined compensable damages broadly, to include cleanup costs as well as injury to persons or property. Any "United States claimant" could assert a claim for these compensable damages. Significantly, a United States claimant was defined as "any person residing in the United States, the Government of the United States or an agency thereof, or the government of a State or a political subdivision thereof, who asserts a claim." § 101(p). Thus, under H. R. 85 a state government would clearly assert a "claim" for its own cleanup expenses.[11] Those expenses would constitute "compensable damages," and § 110 would therefore pre-empt the creation of a special state fund to pay such "claims."

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[10] The Solicitor General relies on language in the House Report on H. R. 85 and in the debates to the effect that the pre-emption provision did not prevent a State from collecting taxes to pay for costs that are not "compensable damages" as defined in that bill. See Brief for United States as *Amicus Curiae* 13–15. However, as the Solicitor General misperceives the broad scope of the term "compensable damages" in H. R. 85, the use of that term in the legislative history of § 110 does not advance his argument.

[11] Bill H. R. 85, unlike CERCLA, did not provide that the President would enter into contracts with a state government under which the latter would undertake to respond to a release on behalf of the President, see 42 U. S. C. § 9604(d). Nor did it give the President special authority to respond to releases, as does CERCLA § 104. It therefore appears that H. R. 85 put both the Federal Government and the affected state government in a position closely analogous to that of a nongovernmental claimant, so far as their ability to seek compensation from the fund for costs of response to an oil spill was concerned. That fact provides further support for the argument that state governments were intended to be "claimants" under H. R. 85.

Nor do CERCLA's other predecessors support the Solicitor General's interpretation. Bill S. 1341, like H. R. 85, provided for claims by governments and had a pre-emption provision similar to § 110.[12] Bill H. R. 7020, as first passed by the House, contained no pre-emption provision. Bill S. 1480 was the most far-reaching of the bills considered, and the first to contemplate a fund of the magnitude of Superfund. As reported out of Committee, it contained no pre-emption provision analogous to § 114(c).

After S. 1480 ran into opposition, the Senate considered two compromise bills intended to be "a combination of the best of [H. R. 85, H. R. 7020, and S. 1480]." 126 Cong. Rec. 30935 (1980) (remarks of Sen. Stafford). The second of these, introduced by Senators Stafford and Randolph, eventually became CERCLA. Only with the Stafford-Randolph substitute bill did the exact language of § 114(c) come into being. Given the remarkable similarity between a debate between Senators Bradley and Randolph on the meaning of § 114(c) and a debate between Congressmen Florio and Biaggi on the meaning of H. R. 85's pre-emption provision,[13] it is unlikely that the Senate considered the two provisions to differ substantially. The substitute bill was prepared and passed in considerable haste, and we are reluctant to conclude that Congress intended to adopt a wholly new approach to pre-emption of state funds by the slight changes in language between § 110 of H. R. 85 and § 114(c) of CERCLA.

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[12] Section 607(b)(1) of S. 1341, 96th Cong., 1st Sess. (1979), provided that a "claim" for removal costs could be asserted "(A) by any agency of the United States Government, [and] (B) by any State, with respect to reimbursements allowed under the system established in the National Contingency Plan." "United States claimant" was defined in exactly the same way as it was in H. R. 85. See S. 1341, § 601(mm). The pre-emption provision, § 612(a), provided that no court action could be maintained to recover for response costs or damages "a claim for which may be asserted under this title," and that "no person may be required to contribute to any fund, the purpose of which is to pay compensation for such a loss."

[13] Compare 126 Cong. Rec. 30949 (1980) (remarks of Sens. Bradley and Randolph), with *id.*, at 26197–26198 (remarks of Reps. Florio and Biaggi).

A second reason for rejecting the Solicitor General's argument proceeds from the wording of § 114(b). That section provides: "Any person who receives compensation for removal costs or damages or claims pursuant to this chapter shall be precluded from recovering compensation" for the same expenses under any other state or federal law. We consider the similarity between § 114(b)'s phrase "removal costs or damages or claims" and § 114(c)'s phrase "costs of response or damages or claims" to suggest that Congress intended the three terms to be read as a unit.[14] When read in conjunction with § 111(a), which provides that Superfund money may be spent on payment of governmental response costs, natural resource damages, and third-party cleanup claims, it seems likely that Congress intended the phrase "removal costs or damages or claims" to provide a shorthand for the authorized uses of Superfund. This strongly undercuts the Solicitor General's approach, because it suggests that Congress envisioned state funds paying "claims" for *all* of the authorized uses of Superfund, including state cleanup costs.

A final reason for so concluding derives from the saving provision of § 114(c). The section provides that nothing in it shall be interpreted to prevent a State from imposing a special tax to purchase or preposition equipment or otherwise prepare for a quick response to hazardous substance releases. If the pre-emption provision does not cover direct governmental expenditures at all, as the Solicitor General contends, then that saving provision is redundant. On balance, then, we conclude that the use of the term "compensation for claims" in § 114(c) represents an instance of inartful drafting rather than the intentional drawing of a subtle distinction.

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[14] Moreover, if the phrase is not to be read as a unit, but split, as the Solicitor General contends, into "claims for any costs of response or damages" and "claims which may be compensated under this subchapter," the latter phrase becomes surplusage. Under the Solicitor General's view, the only two situations that can result in a "claim" under CERCLA are first, when a third party seeks reimbursement for its "costs of response," and second, when a government seeks "damages." See 42 U. S. C. §§ 9611(a)(2), (3). Both situations, however, are already covered in the first phrase, rendering the latter superfluous.

B

Having adopted the parties' view of the interpretation of "costs of response or damages or claims," we must now determine the proper interpretation of the phrase "which may be compensated under this subchapter." The New Jersey Supreme Court read that language very narrowly, concluding that it covered only expenses that are actually paid by Superfund. Appellants, adopting a broader interpretation of "may be compensated," contend that § 114(c) pre-empts any fund that is intended, in whole or in part, to pay for the same types of expenses that may be paid by Superfund.

Appellants challenge the state court's holding on several grounds. First, they contend, it is highly unlikely that a State would choose to pay such double compensation, even in the absence of an express prohibition. Second, § 114(b) provides that any person who receives compensation under Superfund "shall be precluded from recovering compensation for the same removal costs or damages or claims pursuant to any other State or Federal law." The New Jersey Supreme Court's interpretation of § 114(c), therefore, makes that section redundant. Appellants rely most heavily, however, on the literal meaning of the phrase "may be compensated." They contend that the New Jersey courts have violated the plain meaning of the statute by reading the phrase to mean, in effect, "is actually compensated."

We find these arguments persuasive. Congress has already banned double compensation in § 114(b), and there is accordingly no reason to read "may be compensated" to mean "is compensated." The contrary view adopted by the New Jersey Supreme Court renders the first sentence of § 114(c) surplusage. The language of § 114(c) permitting the States to use general revenues for such a fund would also be meaningless under such a narrow reading.

C

Nevertheless, New Jersey contends that the decision below, with one minor modification, is correct. New Jersey concedes that § 114(c) is not restricted to cases in which Superfund actually disburses money. New Jersey argues, however, that § 114(c) applies only when Superfund pays a claim or *would have* paid the claim had it not already been paid by the state fund. It contends that the structure and legislative history of CERCLA support its argument. We will examine each in turn.

New Jersey emphasizes the limited scope of CERCLA. The federal statute does not cover several broad areas—for example, payment for nongovernmental property losses and costs arising from oil spills—that are important aspects of hazardous substance control, and are covered by New Jersey's Spill Act. Moreover, Congress was well aware that the funding level of Superfund was and is insufficient to clean up more than a few of the most dangerous hazardous waste disposal sites. These facts, New Jersey claims, suggest that Congress recognized that Superfund would not solve all of the Nation's hazardous waste problems, and that the States would have to continue their own efforts. It follows that Congress did not intend to pre-empt state taxation to pay for cleanup efforts that the Federal Government was unable to undertake because of unavailability of funds, even though such efforts were of the type that are eligible for Superfund money.

That Congress has not chosen the most comprehensive or efficient method of attacking the problem of hazardous substance discharges, however, is no reason to depart from the language of the statute. Moreover, while we agree with New Jersey that the overall purpose of a statute is a useful referent when trying to decipher ambiguous statutory language, remedying the Nation's toxic waste problems as effectively as possible was not the sole policy choice reflected in CERCLA. Previous attempts to enact a comprehensive hazardous substance response bill were defeated in part because of opposition by the affected industries. It seems clear that the decision to enact a pre-emption provision resulted in part from Congress' concern about the potentially adverse effects of overtaxation on the competitiveness of the American petrochemical industry.[15] That consideration, whether wise or not, cautions against our concluding that Congress would not have wanted to hinder state attempts to clean up hazardous substances in any way.

New Jersey contends, however, that its reading of § 114(c) does no violence to the statutory language. It argues that we must look not only to the provisions of CERCLA, but also to the amount of money available in Superfund, before deciding whether a particular expense "may be compensated" by Superfund. New Jersey argues that the availability of Superfund money is sufficiently low, as a practical matter, that only projects that have been actually approved, or are almost certain to be approved, can be termed "eligible" for Superfund financing, and then only to the extent of the approved funding.

We cannot agree. To say that the only expenses that "may be compensated" are those that *are* compensated twists both language and logic further than we are willing to go.

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[15] See, *e. g.*, H. R. Rep. No. 96–172, p. 22 (1979) (accompanying H. R. 85) ("The increasing distress over the development of a multitude of State statutes related to liability and compensation for damage from oil spills, felt by those engaged in the national and international movement and storage of petroleum and petroleum products, was again articulated. It was argued that, if this continues, they will be severely hampered in their ability to conduct their operations in a manner that is economically sound and of reasonable cost to the consumer of oil"); see also 42 U. S. C. § 9651(a)(1)(F) (requiring President to report to Congress on effect of Superfund tax on "the Nation's balance of trade with other countries").

Had that been Congress' intent, it surely would have said so in plainer terms than those of § 114(c).

Comparisons with the prior bills reinforce our reading of the statute. As previously discussed, § 114(c) is derived from the pre-emption provision of H. R. 85. Section 110 of that bill pre-empted state funds whose purpose was "to compensate for a loss which is a compensable damage" under the bill. This language is not ambiguous; it clearly covers any "compensable" loss, whether or not the claimant actually receives compensation from the federal fund. Bill S. 1341 was the only other bill to contain a pre-emption provision covering state funds, prior to the 11th-hour Stafford-Randolph substitute bill. That provision also unambiguously covers any "compensable" loss.

We also fail to find sufficient support for New Jersey's position in the sparse legislative history of the Stafford-Randolph substitute bill that became CERCLA. New Jersey relies on a floor debate between Senators Bradley and Randolph on § 114(c). New Jersey is correct in arguing that some statements in that debate imply that state fund money could be used for any expense not actually paid by Superfund.[16] In view of the haste with which the bill was considered, and the ambiguities and inaccuracies included in the debate between Senators Bradley and Randolph,[17] we decline to attach any great significance to those statements. Moreover, as we have previously mentioned, the fact that this "debate" was essentially a reenactment of the Florio-Biaggi debate over H. R. 85's pre-emption provision implies that the Senators involved did not consider the two provisions to differ. We reject New Jersey's reading of § 114(c).

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[16] See, *e. g.*, 126 Cong. Rec. 30949 (1980):

"Mr. RANDOLPH. . . . Any damage not reimbursed by this bill fund may similarly be the proper subject of a State fund if a State so chooses to construct its fund.

. . . . .

"Mr. BRADLEY. And am I also correct in noting that State funds are preempted only for efforts which are in fact paid for by the Federal fund and that there would be no preemption for efforts which are eligible for Federal funds but for which there is no reimbursement?

"Mr. RANDOLPH. That is correct."

[17] Taken, in part, word for word from the Florio-Biaggi debate, the Bradley-Randolph debate contains a number of statements that might apply to H. R. 85 but could not apply to CERCLA. Senator Bradley used

IV

Having decided that "may be compensated" should be given its ordinary meaning, we must define the category of expenses that may be compensated by Superfund. Fortunately, CERCLA itself furnishes an appropriate test. Section 105(8)(B) of CERCLA, 42 U. S. C. § 9605(8)(B), requires the President to revise the National Contingency Plan (NCP) to reflect CERCLA's provisions. As part of that revision, the President must create and revise annually a list of sites most in need of federal efforts, now known as the National Priorities List.[18] The NCP currently specifies that removal, or immediate cleanup, will be financed by Superfund only in emergency situations, see 40 CFR § 300.65 (1985). Remedial action will be financed only for sites on the National Priorities List, § 300.68(a). Finally, the Environmental Protection Agency, pursuant to the NCP, has proposed criteria for the use of Superfund money for natural resource claims. See 50 Fed. Reg. 9593 (1985). The NCP, therefore, provides criteria that determine what expenses, at which sites,

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the phrase "compensable damages" from H. R. 85, § 110, which nowhere appears in CERCLA § 114(c). Senator Bradley also referred to "the Secretary" in his questioning. While the hazardous substance program of H. R. 85 was under the control of the Secretary of Transportation, see § 101(a) of that bill as enacted, CERCLA's requirements are addressed to the Administrator of the Environmental Protection Agency and to the President. Finally, Senator Randolph stated that the pre-emption provision would take effect 180 days after passage of the bill—a provision that does not appear in CERCLA.

[18] The National Priorities List is set out at 40 CFR pt. 300, App. B. (1985).

will be eligible for Superfund money. We therefore conclude that the NCP provides the appropriate measure of whether a given expenditure constitutes "costs of response or damages or claims which may be compensated" by Superfund.

CERCLA also provides that a State must agree to pay at least 10% of the cost of any remedial action for a hazardous waste site within the State. 42 U. S. C. § 9604(c)(3)(C). This state share is, by definition, not eligible for Superfund money. We therefore conclude that the 10% state share is not a cost that "may be compensated" by Superfund.

To the extent that appellants argue that § 114(c) covers any cleanup or remedial expenses, whether or not eligible for Superfund compensation, we must reject their position. While we have acknowledged Congress' desire to spare the involved industries from excessive taxation, we must assume that Congress meant the words "which may be compensated under this subchapter" to have some meaning. The only plausible explanation for the use of that phrase is that Congress intended to prohibit state funds that covered Superfund-eligible expenses. Once again, we decline to second-guess the methods Congress used to achieve its purposes.

Our remaining task is to determine whether the "purpose" of the Spill Fund is to pay costs that we have found to fall within the scope of pre-emption. As we have explained above, the Spill Fund may be used for six purposes: (1) to finance governmental cleanup of hazardous waste sites; (2) to reimburse third parties for cleanup costs; (3) to compensate third parties for damage resulting from hazardous substance discharges; (4) to pay personnel and equipment costs; (5) to administer the fund itself; and (6) to conduct research. Of these, the latter four are clearly beyond the scope of CERCLA, and are therefore not covered by § 114(c). The first two are within the scope of CERCLA, except to the extent that they are intended to provide the 10% state share of remedial costs. Those parts of the statute that permit Spill Fund expenditures beyond this state share for remedial costs for sites on the National Priorities List, or for removal costs that are eligible for Superfund compensation under the terms of the NCP, are pre-empted by § 114(c).

New Jersey argues, finally, that after the enactment of CERCLA, or at least after the publication of the National Priorities List, all Spill Fund expenditures for purposes (1) and (2) above have been for non-Superfund eligible sites, and therefore are for nonpre-empted purposes. To the extent that the Spill Act permits taxation to support pre-empted expenditures, however, it cannot stand. State legislation is invalid "to the extent that it actually conflicts with federal law," *Pacific Gas & Electric Co.* v. *Energy Resources Comm'n*, 461 U. S. 190, 204 (1983), and such a conflict has been demonstrated in this case. We leave to the New Jersey Supreme Court the state-law question whether, or to what extent, the nonpre-empted provisions of the statute are severable from the pre-empted provisions. See *Exxon Corp.* v. *Eagerton*, 462 U. S. 176, 196–197 (1983). We decline the dissent's invitation to hold that the Spill Act is valid in its entirety because a substantial portion of its purposes are permissible. Such a holding would be an open invitation to the States to flout federal law by including valid provisions within clearly invalid statutes.

V

To the extent that the New Jersey Supreme Court held that the Spill Act could constitutionally impose a tax to support expenditures for purposes that we have identified above as nonpre-empted, that court's judgment is affirmed. To the extent it held that the Spill Act could constitutionally impose a tax to support expenditures for purposes that we have identified as pre-empted, its judgment is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE POWELL took no part in the consideration or decision of this case.

JUSTICE STEVENS, dissenting.

The purposes of the "Spill Fund" Act passed by the New Jersey Legislature in 1977,[1] and the "Superfund" legislation enacted by the Congress of the United States in 1980[2] overlap partially but not entirely. In the area of overlap, both statutes create funds to defray the costs of responding to environmental damage caused by the disposal of certain hazardous substances. Even in this area, however, the state and federal funds are not identical, for § 114(c) of the federal statute provides that no person may be required to contribute to any state fund if "the purpose" of the fund is to pay "compensation for claims for any costs of response or damages or claims which may be compensated under" the federal fund.[3] The question presented by this case is whether the words "the purpose" should be construed to mean "one of the purposes."

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[1] New Jersey Spill Compensation and Control Act (Spill Fund), N. J. Stat. Ann. §§ 58:10-23.11 to 58:10-23.11z (West 1982 and Supp. 1985).

[2] Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund or CERCLA), 94 Stat. 2767, 42 U. S. C. § 9601 *et seq.*

[3] Section 114(c) of Superfund states in full:

"Except as provided in this Act, no person may be required to contribute to any fund, *the purpose* of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this title. Nothing in this section shall preclude any State from using general revenues for such a fund, or from imposing a tax or fee upon any person or upon any substance in order to finance the purchase or prepositioning of hazardous substance response equipment or other preparations for the response to a release of hazardous substances which affects such State." 94 Stat. 2796, 42 U. S. C. § 9614(c) (emphasis added).

I

Both parties agree that the New Jersey Spill Fund was created to serve multiple purposes, and that at least some of these purposes are not expressly described in § 114(c).[4] Moreover, even if the bulk of the moneys in the Spill Fund has to date been expended in furtherance of purposes served by the federal Superfund, there is no reason to believe that the separate purposes are pretextual or illegitimate, or that in the future New Jersey will not use its Spill Fund to meet an ecological threat, such as an oil spill, for which Superfund makes no provision. See Tr. in Nos. SC 319A–81 and SC 303A–81, p. 21 (N. J. Tax Court).

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[4] As appellants concede, the New Jersey Spill Fund "has subsidiary purposes that do not duplicate those of CERCLA." Brief for Appellants 22, n. 24. For example, while Spill Fund moneys may be used to pay for petroleum and crude oil spills, N. J. Stat. Ann. § 58:10–23.11b(k) (West Supp. 1985), Superfund expressly excludes such pollutants from its definition of "hazardous substances," § 101(14), 94 Stat. 2769, 42 U. S. C. § 9601(14). In addition, New Jersey's Spill Fund authorizes payments for income or property value losses caused by damage resulting from a discharge of hazardous substances, and covers the cost of restoration or replacement of natural resources damaged or destroyed by a discharge. N. J. Stat. Ann. § 58:10–23.11g(a) (West 1982). In contrast, the federal Superfund provides limited damages coverage in relation to natural resources, and authorizes such compensation only if the release occurred after December 11, 1980, and only if the claimants are the United States or a State. §§ 107(a)(4)(A), 107(f), 111(c)(2), 111(d)(1), 94 Stat. 2781, 2783, 2789–2790, 42 U. S. C. §§ 9607(a)(4)(A), 9607(f), 9611(c)(2), 9611(d)(1). Additional expenditures authorized by the State Spill Fund, but not by its federal counterpart, include (1) the purchase and prepositioning of equipment to respond to release of hazardous substances, compare N. J. Stat. Ann. § 58:10–23.11o(4) (West Supp. 1985), with § 114(c), 94 Stat. 2796, 42 U. S. C. § 9614(c); (2) expenses related to administration of the State Spill Fund, see N. J. Stat. Ann. § 58:10–23.11o(4); and (3) research concerning pollution and cleanup techniques, including ocean pollution, see §§ 58:10–23.11o(3), (5). The Spill Fund statute is also authorized to pay the 10% state share "of the costs of the remedial action, including all future maintenance" required in order to qualify for federal funding which is not compensated by Superfund, § 104(c)(3), 94 Stat. 2775–2776, 42 U. S. C. § 9604(c)(3). See N. J. Stat. Ann. §§ 58:10–23.11o(1), (2) (West Supp. 1985). Appellants argued in state court that taxes for this purpose contravene § 114(c).

These concededly legitimate state purposes are, in my view, sufficient to validate the tax supporting New Jersey's Spill Fund. First, § 114(c) literally pre-empts only taxes to support state funds for which "the purpose" is to compensate for claims compensable under Superfund. In accordance with this language, contributions to state funds would be pre-empted only if their sole purpose—or perhaps their only nontrivial purpose—was to compensate for claims covered by Superfund. Unless Congress intended to forbid further contributions to state funds merely because they have not expended "sufficient" moneys on legitimate state objectives (whatever that threshold amount should be), New Jersey's Spill Fund unquestionably escapes the pre-emptive sweep of § 114(c).

If this purely literal reading of § 114(c) resulted in manifest injustice, or were plainly at war with the probable intent of Congress, I would reject it. But such a reading is consistent with the sparse legislative history that has been called to our attention.[5] In the debate on the Senate floor, New Jersey Senator Bradley pointed out that his State had enacted a "Spill Compensation Fund" supported by "a tax applied to transfers of petroleum and a tax on nonpetroleum hazardous substances." 126 Cong. Rec. 30949 (1980), reprinted in Senate Committee on Environment and Public Works, A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund), 97th Cong., 2d Sess., 731 (Comm. Print 1983) (hereinafter 1 Leg. Hist.). Acknowledging industry's fear that it might be forced to bear a "double tax," *ibid.*, the Senator propounded a series of questions to Senator Randolph of West Virginia, the bill's sponsor in the Senate, to clarify the scope of § 114(c). This colloquy, as I read it, is generally in keeping with pre-emption of nothing more than state taxation to support funds for which "the purpose" is to compensate for claims covered by Superfund:

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[5] The explanation for the absence of committee reports and for the brief remarks on the floor lies in the fact that the compromise legislation that became Superfund was introduced as a floor amendment in the Senate in the waning days of the lame-duck session of the 96th Congress. The lineal ancestor of Superfund, S. 1480, was reported out of Committee on November 18, 1980—after the national elections had changed the political complexion by assuring the Republicans control of the Presidency and of the Senate in 1981. In the aftermath of the November elections, S. 1480, along with three other bills, became the subject of an 11th-hour compromise forged primarily in the Senate. The original provision in S. 1480 for a $4.1 billion fund was dramatically reduced to $1.6 billion and, of importance to our inquiry, § 114(c) was added.

> "Mr. BRADLEY.
>
> . . . . .
>
> "Am I correct in understanding that it is the purpose of this legislation [§ 114(c)] to prohibit States from requiring any person to contribute to a fund *for the purpose* of reimbursing claims already provided for in this legislation?
>
> "Mr. RANDOLPH. Yes, that is the clear intent. The purpose is to prohibit States from creating *duplicate funds* to pay damage compensable under this bill.
>
> "Mr. BRADLEY. However, there is *no such preemption* of a State's ability to collect such taxes or fees for *other costs* associated with releases that are not compensable damages as defined in this legislation.
>
> "Mr. RANDOLPH. The Senator is correct.
>
> . . . . .
>
> "Nothing in the language or intent of this bill would prohibit a State from using its fund for the purposes you have inquired about. The purpose of this legislation is simply to preempt *double taxation* of the substances enumerated in the bill *for the purposes* of compensation of the covered damage. . . .

> "*Any damage not reimbursed* by this bill fund may similarly be the proper *subject* of a State fund if a State so chooses to construct its fund. . . .
>
> . . . . .
>
> ". . . What this bill does is prohibit a State from requiring any person to contribute to any fund if *the purpose* of that fund is to compensate for a claim paid for under the provisions of this bill. Thus the State cannot receive a fee or a tax on a substance if that fee or tax is to go into a fund *and the fund is for the purpose* of paying [compensable] claims.
>
> "Putting it simply, this is a prohibition against *double taxation for the same purposes. It [does] not . . . prohibit a State from imposing fees or taxes for other purposes* . . . .
>
> "In summary, Mr. President, this preemption provision is narrow in scope and limited to the particular purpose of preventing double taxation." 126 Cong. Rec., at 30949 (emphasis added), reprinted in 1 Leg. Hist. 731–733.[6]

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[6] I recognize that some language in this colloquy may be read to imply that § 114(c) pre-empts only those state funds whose purpose is to compensate for claims actually paid for by Superfund. See 126 Cong. Rec. 30949 (1980) (remarks of Sen. Bradley and Sen. Randolph), reprinted in 1 Leg. Hist. 731–732. See also 97 N. J. 526, 536–544, 481 A. 2d 271, 276–281 (1984). I agree with the Court that this interpretation conflicts with the "may be compensated" language of § 114(c), would trivialize it by rendering only actual conflicts pre-empted, and would render superfluous the proviso to § 114(c) that States may use "general revenues for such a fund" to pay "costs of response or damages . . . which may be compensated" under Superfund. See *ante*, at 370–371. Besides, it seems odd to suppose that States would choose to compensate claims already redressed by federal funds. In addition to these deficiencies, the colloquy inaccurately refers to a 180-day grace period before pre-emption would take effect and to compensation for damage caused by oil spills. See *ante*, at 373–374, n. 17. In light of the haste with which this legislation was passed, and the consequent inaccuracies of some of the remarks regarding the details of the legislation, I consider the remarks on the floor only at a high level of generality.

The legislation passed by the Senate was introduced in the House of Representatives by Representative Florio of New Jersey, whose brief remarks on the floor are likewise consistent with construing § 114(c) to pre-empt taxation to support state imitations of Superfund:

> "Regarding the preemption language contained in these amendments, I would point out that some States, including my own State of New Jersey, have successful spill funds and that while States may not create *duplicate funds* to pay damages compensable under this bill, there is *no preemption* of the State's ability to collect taxes on fees for *other costs* associated with releases that are *not compensable damages* as defined in this legislation.
>
> ". . . Putting it simply, this is a prohibition against *double taxation for the same purposes.*" 126 Cong. Rec. 31965 (1980) (emphasis added), reprinted in part in 1 Leg. Hist. 780.

As I see it, if Congress had intended to forbid any further contributions to the New Jersey Spill Fund—the existence of which it was made acutely aware—it surely could have expressed that intent in less ambiguous language than is found in § 114(c). Indeed, if that had been its purpose, I would expect it to be revealed either in a committee report or in some unequivocal comment during the debates on the legislation. I have found no such legislative history. In my opinion, we should not presume pre-emption unless Congress clearly identifies its intent to curtail the lawmaking power of a sovereign State, either by careful draftsmanship of its pre-emptive command or by necessary implication based on the scope of its entire regulatory program.[7] The language of § 114(c) is simply too opaque to support the broad prohibition that appellants ask us to find in it.

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[7] See *Chicago & N. W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U. S. 311, 317 (1981) ("Pre-emption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the

II

For the foregoing reasons, the New Jersey Spill Fund tax is not a "contribut[ion]" to a fund "the purpose of which is to pay compensation for claims . . . which may be compensated under" Superfund. Because there exist several legitimate purposes for which New Jersey may expend funds, "the purpose" of the State Spill Fund does not duplicate the purpose of Superfund, and the tax levied to support it is to that extent unquestionably valid under § 114(c). Moreover, while the Spill Fund is by statute available (and has been used) for the purpose described in § 114(c), the State Fund's compensation for claims covered by its federal counterpart does not entitle appellants to a *pro tanto* refund of taxes on a theory that the Spill Fund is "partially pre-empted." The unqualified language of § 114(c) either forbids all contributions to the Fund or it forbids none; it affords no basis for objecting to a tax for the concededly legitimate state purposes identified earlier, see n. 4, *supra*.

But since the Court concludes that the Spill Act is "preempted in part," *ante*, at 358; accord, *ante*, at 376, it must confront the difficult question of relief. In keeping with its "partial pre-emption" analysis, the Court should advise the New Jersey courts how they should calculate the partial refund of taxes to which appellants are presumably entitled on remand. For example, must appellants be refunded the percentage of Spill Act taxes expended on Superfund-compensable claims in the tax years in question, or may the State reduce their refund by imputing an average annual cost for the cleanup of oil spills, which are one of the contingencies against which the Spill Fund was intended to accumulate reserves but which has not yet occurred?

Congress has unmistakably so ordained'" (quoting *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142 (1963)).

Rather than facing up to the difficult but essential remedial choices to which its analysis inescapably gives rise, the Court takes the entirely unresponsive course of resolving a lawsuit that has not yet been filed. In the litigation it apparently contemplates, a contributor to the Spill Fund has challenged a particular expenditure of the Fund as being in conflict with § 114(c). In this situation, I might agree that the purpose of § 114(c)'s pre-emption of double *taxation* prevents New Jersey from *spending* these moneys on activities compensable under Superfund. Taxing and spending are obviously linked in § 114(c): taxes may not be levied to support funds indemnifying claims compensable under Superfund. Given this linkage, the hypothetical plaintiff might argue that § 114(c)'s prohibition of "double taxation" pre-empts state expenditures of Spill Fund moneys for Superfund-compensable claims generally, whether collected in a separately identifiable fund or not, on the theory that such expenditures would constitute the functional equivalent of a distinct "fund" whose purpose is to pay claims compensable under Superfund.[8]

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[8] New Jersey recognizes an obligation to expend Spill Fund moneys in furtherance of purposes not benefited by Superfund, and has promulgated regulations intended to promote administration of the State Spill Fund in conformity with Superfund by circumscribing permissible expenditures. See Regulations Governing New Jersey Spill Compensation Fund Expenditures in Light of Federal Superfund Law, N. J. Admin. Code 17:26–2.1 (Supp. 1985). These regulations limit Spill Fund expenditures to the following eight purposes: (1) "[t]he clean-up and removal of a petroleum or petroleum products discharge"; (2) certain third-party damages payments; (3) "[t]he administrative costs of the fund"; (4) "[t]he cost of purchasing or pre-positioning hazardous substance response equipment or other preparations for the response"; (5) the 10% state share of remedial costs; (6) the advancement of moneys for the cleanup and removal of hazardous substances for which the State has a prior commitment for reimbursement from Superfund; (7) for the above purpose if the state fund administrator promptly applies for federal reimbursement; and (8) any payments authorized by the Act using tax revenues collected before the effective date of Superfund. 14 N. J. Reg. 36(b) (1982). Appellants have contested only purposes five through seven. See App. to Brief on Behalf of Plaintiffs-

But whatever the merits of the hypothesized challenge to particular state expenditures, the case or controversy which would raise it is *not* before this Court. Appellants challenge the Spill Fund tax in its entirety; they make no claim for a partial refund. App. to Brief on Behalf of Plaintiffs-Appellants in No. A–3913–81T1 (N. J. Super. Ct.), pp. 2a–7a (N. J. Tax Court Complaint ¶¶3–4); *id.*, at 16a–23a (N. J. Chancery Division Complaint ¶¶11–36); Tr. in Nos. SC 319A–81 & SC 303A–81, p. 34 (N. J. Tax Court). This litigation does not concern any particular expenditure of Spill Fund assets for *any* purpose, let alone the purpose described in § 114(c).[9] As a consequence, it is plainly inappropriate to let stand the Spill Fund tax challenged by appellants and instead order New Jersey to restrict Fund expenditures not properly before us.

Of course, if the hypothesized challenge were successful, the Court would be entirely correct that the next question would be whether New Jersey would have set the same tax rate despite circumscription of the purposes for which the Fund might be expended, and that this state-law question should be left for the New Jersey courts.[10] The only ques-

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Appellants in No. A–3913–81T1 (N. J. Super. Ct.), pp. 122a–126a. See also n. 4, *supra*. Appellants' challenge to the validity of the fifth purpose is not pressed in this Court; the sixth and seventh purposes provide for the advancement of cleanup funds (in effect, loans) in anticipation of an award of federal funds.

These regulations were held invalid by the New Jersey intermediate appellate court for failure to satisfy a statutory notice period, 190 N. J. Super. 131, 133–134, 462 A. 2d 193, 195 (1983), and they are not before us. According to the New Jersey Office of Administrative Law, the regulation, although invalid, is still "on the books." Further action presumably awaits the decision of this Court.

[9] Indeed, the record on which the New Jersey Tax Court awarded summary judgment was so lacking in information regarding Spill Fund expenditures that appellants saw the need to supplement the record in this Court.

[10] If the New Jersey courts were to hold that the proscribed purposes were severable from the permissible ones, appellants would be entitled to

tion before us today, however, is whether "the purpose" of the New Jersey tax is to fund claims which may be compensated under Superfund. For me, the universal agreement that the tax moneys poured into New Jersey's Spill Fund may be spent in furtherance of entirely valid purposes is sufficient to sustain the state tax.

The judgment of the Supreme Court of New Jersey should be affirmed.

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no refund. If they were to find instead that the legitimate purposes were inseparable from the purposes described in § 114(c), the Spill Fund would stand or fall in its entirety.

It seems likely that the New Jersey courts would find the invalid provisions severable. The New Jersey Tax Court found a "legislative intent that every purpose of spill fund was to be accomplished" and concluded that "the Legislature specifically envisioned that the spill act would be enforced in conjunction with any other applicable law." *Exxon Corp.* v. *Hunt*, 4 N. J. Tax 294, 320 (1982). Accordingly, it held that "even if § 114(c) of super fund could be construed to preempt part of spill fund, the aforementioned nonpreempted areas are more than sufficient to sustain its continued validity." *Ibid.* The New Jersey Supreme Court acknowledged the Tax Court's alternative holding, but relied on its primary holding that § 114(c) pre-empted only claims actually compensated to uphold the Spill Fund. See 97 N. J., at 530, 481 A. 2d, at 273.

UNITED STATES *v.* INADI

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 84–1580. Argued December 3, 1985—Decided March 10, 1986

Following a jury trial in Federal District Court, respondent was convicted of conspiring to manufacture and distribute methamphetamine, and related offenses. Part of the evidence consisted of taped conversations between various participants in the conspiracy. Respondent sought to exclude the recorded statements of the unindicted co-conspirators, including one Lazaro, on the ground that they did not satisfy the requirements of Federal Rule of Evidence 801(d)(2)(E), which provides that a statement by a co-conspirator of a party made "during the course and in furtherance of the conspiracy" is not hearsay when offered against the party. Respondent also objected to the admission of the statements on Confrontation Clause grounds, contending that they were inadmissible absent a showing that the declarants were unavailable. The District Court held that the statements satisfied Rule 801(d)(2)(E), and admitted the statements, conditioned on the prosecution's commitment to produce Lazaro. The Government subpoenaed Lazaro, but he failed to appear, and defense counsel made no effort to secure his presence. The court then overruled respondent's renewed Confrontation Clause objections, holding that Lazaro's statements were admissible because they satisfied the co-conspirator rule. The Court of Appeals reversed, holding, in reliance on *Ohio* v. *Roberts*, 448 U. S. 56, that although Rule 801(d)(2)(E) had been satisfied, the Confrontation Clause established an independent requirement that the Government, as a condition to admission of any out-of-court statements, must show the declarant's unavailability.

Held: The Confrontation Clause does not require a showing of unavailability as a condition to admission of the out-of-court statements of a nontestifying co-conspirator. Pp. 392–400.

(a) *Ohio* v. *Roberts*, *supra*, which simply reaffirmed a longstanding rule that applies unavailability analysis to the prior testimony of a witness not produced at trial, cannot fairly be read to stand for the proposition that no out-of-court statement can be introduced by the prosecution without a showing that the declarant is unavailable. Pp. 392–394.

(b) The principles whereby prior testimony may be admitted as a substitute for live testimony only if the declarant is unavailable do not apply to co-conspirator statements. Co-conspirator statements derive much of their value from the fact that they are made in a context very different from trial, and therefore are usually irreplaceable as substantive evidence. Their admission into evidence thus actually furthers the Confrontation Clause's mission of advancing the "truth-determining process." Pp. 394-396.

(c) Little benefit would be accomplished by an unavailability rule. Under such a rule, if the co-conspirator either is unavailable or is available and produced by the prosecution, his prior statements could be introduced. Nor is an unavailability rule likely to produce much testimony that adds anything to the "truth-determining process" over and above what would be produced without such a rule, because the relative interests of the parties will have changed drastically. In contrast to the slight benefits, the burden imposed by an unavailability rule is significant. A rule that required each invocation of Rule 801(d)(2)(E) to be accompanied by a decision on the declarant's availability would impose a substantial burden on the entire criminal justice system. Moreover, a significant practical burden would be imposed on the prosecution, since in every case involving co-conspirators' statements, the prosecution would be required to identify each declarant, locate them, and then attempt to ensure their availability for trial. Pp. 396-400.

748 F. 2d 812, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 400.

Deputy Solicitor General Frey argued the cause for the United States. With him on the briefs were *Solicitor General Fried, Assistant Attorney General Trott, Samuel A. Alito, Jr.*, and *Patty Merkamp Stemler.*

Holly Maguigan argued the cause for respondent. With her on the brief were *Julie Shapiro* and *William F. Sheehan.*

JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether the Confrontation Clause requires the Government to show that a nontestifying co-conspirator is unavailable to testify, as a condition for admission of that co-conspirator's out-of-court statements.

I

Following a jury trial in the Eastern District of Pennsylvania, respondent Joseph Inadi was convicted of conspiring to manufacture and distribute methamphetamine, and related offenses. He was sentenced to three years' imprisonment to be followed by a 7-year parole term. The evidence at trial showed that in September 1979, respondent was approached by unindicted co-conspirator Michael McKeon, who was seeking a distribution outlet for methamphetamine. Respondent's role was to supply cash and chemicals for the manufacture of methamphetamine and to be responsible for its distribution. McKeon and another unindicted co-conspirator, William Levan, were to manufacture the substance.

In the course of manufacturing and selling methamphetamine, McKeon, Levan, and respondent met with another unindicted co-conspirator, John Lazaro, at an empty house in Cape May, New Jersey. There they extracted additional methamphetamine from the liquid residue of previous batches. In the early morning hours of May 23, 1980, two Cape May police officers, pursuant to a warrant, secretly entered the house and removed a tray covered with drying methamphetamine. With the permission of the issuing Magistrate, the officers delayed returning an inventory, leaving the participants to speculate over what had happened to the missing tray.

On May 25, 1980, two Drug Enforcement Administration agents in Philadelphia monitored a meeting between respondent and Lazaro alongside Lazaro's car. At one point one of the agents saw respondent lean into the car. After Lazaro drove off, the agents stopped his car. They searched the car, Lazaro, and a passenger, Marianne Lazaro, but they found nothing and let the Lazaros leave. Marianne Lazaro later recounted that during the search she threw away a clear plastic bag containing white powder that her husband had handed to her after the meeting with respondent. Eight hours after the search, one of the agents returned to the scene of the crime and found a clear plastic bag containing a small quantity of methamphetamine.

From May 23 to May 27, 1980, the Cape May County Prosecutor's Office lawfully intercepted and recorded five telephone conversations between various participants in the conspiracy. These taped conversations were played for the jury at trial. The conversations dealt with various aspects of the conspiracy, including planned meetings and speculation about who had taken the missing tray from the house and who had set Lazaro up for the May 25 stop and search. Respondent sought to exclude the recorded statements of Lazaro and the other unindicted co-conspirators on the ground that the statements did not satisfy the requirements of Federal Rule of Evidence 801(d)(2)(E), governing admission of co-conspirator declarations.[1] After listening to the tapes the trial court admitted the statements, finding that they were made by conspirators during the course of and in furtherance of the conspiracy, and thereby satisfied Rule 801(d)(2)(E).

Respondent also objected to admission of the statements on Confrontation Clause grounds, contending that the statements were inadmissible absent a showing that the declarants were unavailable. The court suggested that the prosecutor bring Lazaro to court in order to demonstrate unavailability. The court also asked defense counsel whether she wanted the prosecution to call Lazaro as a witness, and defense counsel stated that she would discuss the matter with her client. The co-conspirators' statements were admitted, conditioned on the prosecution's commitment to produce Lazaro. The Government subpoenaed Lazaro, but he failed to appear, claiming car trouble. The record does not indicate that the defense made any effort on its own part to secure Lazaro's presence in court.

Respondent renewed his Confrontation Clause objections, arguing that the Government had not met its burden of showing that Lazaro was unavailable to testify. The trial court overruled the objection, ruling that Lazaro's statements were admissible because they satisfied the co-conspirator rule.[2]

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[1] Federal Rule of Evidence 801(d)(2)(E) provides that a statement is not hearsay if it is offered against a party and is "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy."

The Court of Appeals for the Third Circuit reversed. 748 F. 2d 812 (1984). The court agreed that the Government had satisfied Rule 801(d)(2)(E), but decided that the Confrontation Clause established an independent requirement that the Government, as a condition to admission of any out-of-court statements, must show the unavailability of the declarant. 748 F. 2d, at 818. The court derived this "unavailability rule" from *Ohio* v. *Roberts*, 448 U. S. 56 (1980). The Court of Appeals rejected the Government's contention that *Roberts* did not require a showing of unavailability as to a nontestifying co-conspirator, finding that *Roberts* created a "clear constitutional rule" applicable to out-of-court statements generally. 748 F. 2d, at 818. The court found no reason to create a special exception for co-conspirator statements, and therefore ruled Lazaro's statements inadmissible. *Id.*, at 818–819.

We granted certiorari, 471 U. S. 1124 (1985), to resolve the question whether the Confrontation Clause requires a showing of unavailability as a condition to admission of the out-of-court statements of a nontestifying co-conspirator, when those statements otherwise satisfy the requirements of Federal Rule of Evidence 801(d)(2)(E).[3] We now reverse.

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[2] The trial court also noted that two of the four co-conspirator declarants (Mrs. Lazaro and McKeon) had testified and that a third (Levan) was unavailable because he had asserted his Fifth Amendment privilege outside the presence of the jury.

[3] The reliability of the out-of-court statements is not at issue in this case. The Court of Appeals determined that whether or not the statements are reliable, their admission violated the Sixth Amendment because the Government did not show that the declarant was unavailable to testify. 748 F. 2d, at 818–819. The sole issue before the Court is whether that decision is correct.

II

A

The Court of Appeals derived its rule that the Government must demonstrate unavailability from our decision in *Roberts*. It quoted *Roberts* as holding that "in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case . . . the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." 448 U. S., at 65. The Court of Appeals viewed this language as setting forth a "clear constitutional rule" applicable before any hearsay can be admitted. 748 F. 2d, at 818. Under this interpretation of *Roberts*, no out-of-court statement would be admissible without a showing of unavailability.

Roberts, however, does not stand for such a wholesale revision of the law of evidence, nor does it support such a broad interpretation of the Confrontation Clause. *Roberts* itself disclaimed any intention of proposing a general answer to the many difficult questions arising out of the relationship between the Confrontation Clause and hearsay. "The Court has not sought to 'map out a theory of the Confrontation Clause that would determine the validity of all . . . hearsay "exceptions."'" 448 U. S., at 64–65, quoting *California* v. *Green*, 399 U. S. 149, 162 (1970). The Court in *Roberts* remained "[c]onvinced that 'no rule will perfectly resolve all possible problems'" and rejected the "invitation to overrule a near-century of jurisprudence" in order to create such a rule. 448 U. S., at 68, n. 9, quoting Natali, *Green, Dutton,* and *Chambers:* Three Cases in Search of a Theory, 7 Rutgers-Camden L. J. 43, 73 (1975). In addition, the Court specifically noted that a "demonstration of unavailability . . . is not always required." 448 U. S., at 65, n. 7. In light of these limiting statements, *Roberts* should not be read as an abstract answer to questions not presented in that case, but rather as a resolution of the issue the Court said it was examining: "the constitutional propriety of the introduction in evidence of the preliminary hearing testimony of a witness not produced at the defendant's subsequent state criminal trial." *Id.*, at 58.[4]

The Confrontation Clause analysis in *Roberts* focuses on those factors that come into play when the prosecution seeks to admit testimony from a prior judicial proceeding in place of live testimony at trial. See Fed. Rule Evid. 804(b)(1). In particular, the *Roberts* Court examined the requirement, found in a long line of Confrontation Clause cases involving prior testimony, that before such statements can be admitted the government must demonstrate that the declarant is unavailable. See *Mancusi* v. *Stubbs*, 408 U. S. 204 (1972); *California* v. *Green*, *supra; Barber* v. *Page*, 390 U. S. 719 (1968); *Berger* v. *California*, 393 U. S. 314 (1968).[5] All of the cases cited in *Roberts* for this "unavailability rule" concern prior testimony. In particular, the Court focused on two cases, *Barber* and *Mancusi*, that directly "explored the issue of constitutional unavailability." 448 U. S., at 76. Both cases specifically limited the unavailability requirement to prior testimony. *Barber*, *supra*, at 722; *Mancusi*, *supra*, at 211.

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[4] *Roberts* involved a state criminal trial on charges of forging a check in the name of Bernard Isaacs and of possession of stolen credit cards belonging to Isaacs and his wife. At the preliminary hearing, defense counsel called the Isaacs' daughter as a witness. She testified that she had permitted the defendant to use the Isaacs' apartment for several days, but she refused to admit that she had given the defendant the checks or credit cards. Between the preliminary hearing and the trial, through no fault of the State, she disappeared. At trial, the defendant testified that the Isaacs' daughter had given him the checks and credit cards to use. The State sought to offer the transcript of her preliminary hearing testimony in rebuttal. 448 U. S., at 58–60.

[5] Federal Rule of Evidence 804 also imposes an unavailability requirement before allowing the admission of prior testimony. The Rule 804 requirement is part of the law of evidence regarding hearsay. While it "may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values," *California* v. *Green*, 399 U. S., at 155, the overlap is not complete.

Roberts must be read consistently with the question it answered, the authority it cited, and its own facts. All of these indicate that *Roberts* simply reaffirmed a longstanding rule, foreshadowed in *Pointer* v. *Texas*, 380 U. S. 400 (1965), established in *Barber*, and refined in a line of cases up through *Roberts*, that applies unavailability analysis to prior testimony.[6] *Roberts* cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable.

B

There are good reasons why the unavailability rule, developed in cases involving former testimony, is not applicable to co-conspirators' out-of-court statements. Unlike some other exceptions to the hearsay rules, or the exemption from the hearsay definition involved in this case, former testimony often is only a weaker substitute for live testimony. It seldom has independent evidentiary significance of its own, but is intended to replace live testimony. If the declarant is available and the same information can be presented to the trier of fact in the form of live testimony, with full cross-examination and the opportunity to view the demeanor of the declarant, there is little justification for relying on the weaker version. When two versions of the same evidence are available, longstanding principles of the law of hearsay, applicable as well to Confrontation Clause analysis, favor the better evidence. See Graham, The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One, 8 Crim. L. Bull. 99, 143 (1972). But if the declarant is unavailable, no "better" version of the evidence exists, and the former testimony may be admitted as a substitute for live testimony on the same point.

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[6] In federal court the unavailability rule for former trial testimony was established long before *Pointer* v. *Texas*, 380 U. S. 400 (1965), in *Mattox* v. *United States*, 156 U. S. 237 (1895).

Those same principles do not apply to co-conspirator statements. Because they are made while the conspiracy is in progress, such statements provide evidence of the conspiracy's context that cannot be replicated, even if the declarant testifies to the same matters in court. When the Government—as here—offers the statement of one drug dealer to another in furtherance of an illegal conspiracy, the statement often will derive its significance from the circumstances in which it was made. Conspirators are likely to speak differently when talking to each other in furtherance of their illegal aims than when testifying on the witness stand. Even when the declarant takes the stand, his in-court testimony seldom will reproduce a significant portion of the evidentiary value of his statements during the course of the conspiracy.

In addition, the relative positions of the parties will have changed substantially between the time of the statements and the trial. The declarant and the defendant will have changed from partners in an illegal conspiracy to suspects or defendants in a criminal trial, each with information potentially damaging to the other. The declarant himself may be facing indictment or trial, in which case he has little incentive to aid the prosecution, and yet will be equally wary of coming to the aid of his former partners in crime. In that situation, it is extremely unlikely that in-court testimony will recapture the evidentiary significance of statements made when the conspiracy was operating in full force.

These points distinguish co-conspirators' statements from the statements involved in *Roberts* and our other prior testimony cases. Those cases rested in part on the strong similarities between the prior judicial proceedings and the trial. No such strong similarities exist between co-conspirator statements and live testimony at trial. To the contrary, co-conspirator statements derive much of their value from the fact that they are made in a context very different from trial, and therefore are usually irreplaceable as substantive evidence. Under these circumstances, "only clear folly would dictate an across-the-board policy of doing without" such statements. Advisory Committee's Introductory Note on the Hearsay Problem, quoted in Westen, The Future of Confrontation, 77 Mich. L. Rev. 1185, 1193, n. 35 (1979). The admission of co-conspirators' declarations into evidence thus actually furthers the "Confrontation Clause's very mission" which is to "advance 'the accuracy of the truth-determining process in criminal trials.'" *Tennessee* v. *Street*, 471 U. S. 409, 415 (1985), quoting *Dutton* v. *Evans*, 400 U. S. 74, 89 (1970).

C

There appears to be little, if any, benefit to be accomplished by the Court of Appeals' unavailability rule. First, if the declarant either is unavailable, or is available and produced by the prosecution, the statements can be introduced anyway. Thus, the unavailability rule cannot be defended as a constitutional "better evidence" rule, because it does not actually serve to exclude anything, unless the prosecution makes the mistake of not producing an otherwise available witness. Cf. Westen, *supra;* Davenport, The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis, 85 Harv. L. Rev. 1378, 1403 (1972). In this case, for example, out-of-court statements by Michael McKeon and Marianne Lazaro, who testified under immunity, could be introduced based on their testimony in court. The statements of William Levan were admissible because he properly asserted his Fifth Amendment privilege and thereby was unavailable.

Second, an unavailability rule is not likely to produce much testimony that adds anything to the "truth-determining process" over and above what would be produced without such a rule. *Dutton, supra*, at 89. Some of the available declarants already will have been subpoenaed by the prosecution or the defense, regardless of any Confrontation Clause requirements. Presumably only those declarants that neither side believes will be particularly helpful will not have been subpoenaed as witnesses. There is much to indicate that Lazaro was in that position in this case. Neither the Government nor the defense originally subpoenaed Lazaro as a witness.[7] When he subsequently failed to show, alleging car trouble, respondent did nothing to secure his testimony. If respondent independently wanted to secure Lazaro's testimony, he had several options available, particularly under Federal Rule of Evidence 806,[8] which provides that if the party against whom a co-conspirator statement has been admitted calls the declarant as a witness, "the party is entitled to examine him on the statement as if under cross-examination." Rule 806 would not require respondent to make the showing necessary to have Lazaro declared a hostile witness, although presumably that option also was available to him. The Compulsory Process Clause would have aided respondent in obtaining the testimony of any of these declarants.[9] If the

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[7] In fact, the actions of the parties in this case demonstrate what is no doubt a frequent occurrence in conspiracy cases—neither side wants a co-conspirator as a witness. As explained *supra*, at 395, the interests of the prosecution and the co-conspirator seldom will run together. Nor do the co-conspirator's interests coincide with his former partners, since each is in a position that is potentially harmful to the others.

[8] Rule 806 states:

"When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. . . . If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination."

[9] U. S. Const., Amdt. 6: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ." Cf. Westen, Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases, 91 Harv. L. Rev. 567, 586–601 (1978).

Government has no desire to call a co-conspirator declarant as a witness, and if the defense has not chosen to subpoena such a declarant, either as a witness favorable to the defense, or as a hostile witness, or for cross-examination under Federal Rule of Evidence 806,[10] then it is difficult to see what, if anything, is gained by a rule that requires the prosecution to make that declarant "available."[11]

While the benefits seem slight, the burden imposed by the Court of Appeals' unavailability rule is significant. A constitutional rule requiring a determination of availability every time the prosecution seeks to introduce a co-conspirator's declaration automatically adds another avenue of appellate review in these complex cases. The co-conspirator rule apparently is the most frequently used exception to the hearsay rule. See 4 D. Louisell & C. Mueller,

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[10] It is not clear from the Court of Appeals' opinion whether in order to meet its burden of showing unavailability, the prosecution would be required to call the declarant as a witness, or only to ensure that the declarant is available for testimony if needed. The unavailability rule suffers from many of the same flaws under either interpretation, and in fact may be even less defensible under an interpretation requiring the prosecution to call each declarant as a witness.

[11] In addition to the reasons mentioned in the text why an unavailability rule would be of little value, many co-conspirator statements are not introduced to prove the truth of the matter asserted, and thus do not come within the traditional definition of hearsay, even without the special exemption of Federal Rule of Evidence 801(d)(2)(E). Thus, some of the out-of-court statements in this case presumably could be admitted without implicating the Confrontation Clause. For example, in one of the recorded phone conversations Levan and Lazaro discuss the missing tray with Lazaro suggesting that "Mike" took it and speculating about who set Lazaro up for the May 25 stop. 748 F. 2d, at 815. Certainly these statements were not introduced in order to prove the truth of the matters asserted, but as background for the conspiracy, or to explain the significance of certain events. We explained just last Term that admission of nonhearsay "raises no Confrontation Clause concerns." *Tennessee* v. *Street*, 471 U. S. 409, 414 (1985). Cross-examination regarding such statements would contribute nothing to Confrontation Clause interests.

Federal Evidence § 427, p. 331 (1980).[12] A rule that required each invocation of Rule 801(d)(2)(E) to be accompanied by a decision on the declarant's availability would impose a substantial burden on the entire criminal justice system.

Moreover, an unavailability rule places a significant practical burden on the prosecution. In every case involving co-conspirator statements, the prosecution would be required to identify with specificity each declarant, locate those declarants, and then endeavor to ensure their continuing availability for trial. Where declarants are incarcerated there is the burden on prison officials and marshals of transporting them to and from the courthouse, as well as the increased risk of escape. For unincarcerated declarants the unavailability rule would require that during the sometimes lengthy period before trial the Government must endeavor to be aware of the whereabouts of the declarant or run the risk of a court determination that its efforts to produce the declarant did not satisfy the test of "good faith." See *Ohio* v. *Roberts*, 448 U. S., at 74–77; *id.*, at 77–82 (BRENNAN, J., dissenting); see also *United States* v. *Ordonez*, 737 F. 2d 793, 802 (CA9 1984).[13]

An unavailability rule would impose all of these burdens even if neither the prosecution nor the defense wished to examine the declarant at trial. Any marginal protection to the defendant by forcing the government to call as witnesses those co-conspirator declarants who are available, willing to testify, hostile to the defense, and yet not already subpoenaed by the prosecution, when the defendant himself can call and cross-examine such declarants, cannot support an unavailability rule. We hold today that the Confrontation Clause does not embody such a rule.

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[12] Federal Rule of Evidence 801 characterizes out-of-court statements by co-conspirators as exemptions from, rather than exceptions to, the hearsay rule. Whether such statements are termed exemptions or exceptions, the same Confrontation Clause principles apply.

[13] The court in *Ordonez* found a Confrontation Clause violation because the Government, after introducing drug ledgers containing entries made by unidentified co-conspirators, did not adequately demonstrate that it was totally unable to identify those conspirators.

III

To some degree, respondent's arguments in this case require us to revisit this Court's resolution of this question in *Dutton* v. *Evans*, 400 U. S. 74 (1970). Although *Dutton* involved a state co-conspirator rule instead of Federal Rule of Evidence 801, the state rule actually admitted a broader category of co-conspirator statements. Nevertheless, a plurality of this Court found that the rule did not violate the Confrontation Clause and a fifth Member of the Court, Justice Harlan, reasoned that the Confrontation Clause was not applicable at all. In *Dutton* the plurality stated that "we do not question the validity of the coconspirator exception applied in the federal courts." *Id.*, at 80. Upon closer examination today, we continue to affirm the validity of the use of co-conspirator statements, and we decline to require a showing of the declarant's unavailability as a prerequisite to their admission.

We accordingly reverse the judgment of the Court of Appeals for the Third Circuit.

It is so ordered.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

With respect to the case before us, the majority takes but a small step. In *Ohio* v. *Roberts*, 448 U. S. 56 (1980), the Court held: "[W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.'" *Id.*, at 66 (quoting *Dutton* v. *Evans*, 400 U. S. 74, 89 (1970) (plurality opinion)). The majority now assures us that "[t]he reliability of the out-of-court statements is not at issue in this case." *Ante*, at 391, n. 3. Respondent is thus free to return to the Court of Appeals and argue that the co-conspirator declarations admitted against him lack the "indicia of reliability" demanded by the Confrontation Clause.[1]

With respect to its constitutional analysis, however, the majority makes a giant leap. Even while conceding that the "'very mission'" of the Confrontation Clause is to "'advance "the accuracy of the truth-determining process in criminal trials,"'" *ante*, at 396 (citations omitted), the Court today holds that the Clause is not offended when the prosecution fails to make even the slightest effort to produce for cross-examination the authors of the out-of-court statements with which it hopes to convict a defendant. Because I cannot share the majority's implicit faith that the camaraderie of a criminal conspiracy can substitute for in-court cross-examination to guarantee the reliability of conspiratorial statements, I can neither accept the majority's analysis nor stand silent while the values embodied in the Sixth Amendment are so cavalierly subordinated to prosecutorial efficiency.

I

A

In *Ohio* v. *Roberts*, *supra*, after canvassing the many previous cases that had examined the relationship between the

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[1] Today's decision does nothing to resolve the conflict among the lower courts as to whether declarations of co-conspirators who are not present in court for cross-examination must be shown to have particularized "indicia of reliability" before they can be admitted for substantive purposes against a criminal defendant. Compare *United States* v. *DeLuna*, 763 F. 2d 897 (CA8 1985) (particularized inquiry into reliability of co-conspirator statements demanded in addition to unavailability requirement); *United States* v. *Ordonez*, 722 F. 2d 530, 535 (CA9 1983) (particularized assessment of reliability needed for every statement admitted under co-conspirator hearsay exemption); *United States* v. *Perez*, 702 F. 2d 33 (CA2) (same), cert. denied, 462 U. S. 1108 (1983), with *Boone* v. *Marshall*, 760 F. 2d 117, 119 (CA6 1985) (declaration admitted under co-conspirator exemption "automatically satisfies the Sixth Amendment requirements"); *United States* v. *Molt*, 758 F. 2d 1198 (CA7 1985) (same); *Ottomano* v. *United States*, 468 F. 2d 269, 273 (CA1 1972) (same), cert. denied, 409 U. S. 1128 (1973). See Mueller, The Federal Coconspirator Exception: Action, Assertion, and Hearsay, 12 Hofstra L. Rev. 323, 361–362, and nn. 131–132 (1984).

Confrontation Clause of the Sixth Amendment and the many exceptions to the hearsay rule, the Court noted:

> "The Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay. First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant. . . .
>
> "The second aspect operates once a witness is shown to be unavailable. Reflecting its underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule.'" *Id.*, at 65 (quoting *Snyder* v. *Massachusetts*, 291 U. S. 97, 107 (1934)).

This sweeping language was in no way limited to any particular variety of out-of-court declarations, and the Third Circuit panel that the Court reverses today was hardly alone in believing the rule in *Roberts* to be applicable to all such declarations. See, *e. g.*, *United States* v. *Massa*, 740 F. 2d 629, 639 (CA8 1984); *Haggins* v. *Warden*, 715 F. 2d 1050, 1055 (CA6 1983), cert. denied, 464 U. S. 1071 (1984); see also *United States* v. *Caputo*, 758 F. 2d 944, 950, n. 2 (CA3 1985) (collecting cases). The majority, however, now tells us that *Roberts* "simply reaffirmed a longstanding rule . . . that applies unavailability analysis to prior testimony." *Ante*, at 394. This effort to confine *Roberts* misconstrues both the meaning of that decision and the essential command of the Confrontation Clause.

Contrary to the majority's suggestion, it is clear that the *Roberts* Court consciously sought to lay down an analytical framework applicable to all out-of-court declarations introduced by the prosecution for the truth they contain. JUSTICE BLACKMUN, writing for the Court, introduced his affirmation of the Confrontation Clause's twin requirements of unavailability and reliability by noting: "The Court has not sought to 'map out a theory of the Confrontation Clause that would determine the validity of all . . . hearsay "exceptions."' *California* v. *Green*, 399 U. S. [149,] 162 [1970]. But a general approach to the problem is discernible." 448 U. S., at 64–65. For its general principles, the *Roberts* Court of course turned to a number of cases involving former testimony, *e. g.*, *Mancusi* v. *Stubbs*, 408 U. S. 204 (1972); *Barber* v. *Page*, 390 U. S. 719 (1968); *Motes* v. *United States*, 178 U. S. 458 (1900); *California* v. *Green*, 399 U. S. 149 (1970) (all cited at 448 U. S., at 65). But it also relied on *Dutton* v. *Evans*, 400 U. S. 74 (1970) (cited at 448 U. S., at 65, n. 7, and 66), where the hearsay had been admitted pursuant to the Georgia co-conspirator exception, and *Douglas* v. *Alabama*, 380 U. S. 415 (1965) (cited at 448 U. S., at 63), which involved an accomplice's confession. Indeed, it was on *Douglas* that *Roberts* relied for the proposition that "the Confrontation Clause reflects a preference for face-to-face confrontation at trial, and that a 'primary interest secured by [the provision] is the right of cross-examination.'" 448 U. S., at 63 (footnote omitted) (quoting *Douglas*, *supra*, at 418).

The absence of any language in *Roberts* confining its analysis to prior testimony is not surprising. The Court simply recognized that whenever the prosecution seeks to convict a defendant by relying on the truth asserted in out-of-court declarations, confrontation and cross-examination of the declarant in open court are the most trusted guarantors of the reliability that is the primary concern of the Confrontation Clause. The need for these guarantors is as critical in cases involving the extrajudicial statements of co-conspirators as it is in cases involving the prior testimony of an absent declarant or the confession of an accomplice.

B

When the prosecution introduces the statements of a co-conspirator merely to show what the declarant might have been thinking or what he wished his listeners to believe at the time he spoke, neither the rule against hearsay nor the Confrontation Clause is implicated by their admission against a defendant. See *Tennessee* v. *Street*, 471 U. S. 409 (1985). However, when the prosecution invokes the co-conspirator exemption to the hearsay rule, as it does in this case, it is urging the truth of the matters asserted in the extrajudicial statements. The question here must be whether we have so much confidence in the factual accuracy of statements made by conspirators in furtherance of their conspiracy that we deem the testing of these statements by cross-examination unnecessary to guarantee the reliability of a trial's result.

The majority is quite right to suggest that "[c]onspirators are likely to speak differently when talking to each other in furtherance of their illegal aims than when testifying on the witness stand." *Ante*, at 395. However, the differences between an accomplice's conspiratorial utterances and his testimony in court are not merely those of diction and demeanor. That a statement was truly made "in furtherance" of a conspiracy cannot possibly be a guarantee, or even an indicium, of its reliability. See Davenport, The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis, 85 Harv. L. Rev. 1378, 1384–1391 (1972); Note, Federal Rule of Evidence 801(d)(2)(E) and the Confrontation Clause: Closing the Window of Admissibility for Coconspirator Hearsay, 53 Ford. L. Rev. 1291, 1311–1312 (1985). As one commentator has noted:

> "Conspirators' declarations are good to prove that some conspiracy exists but less trustworthy to show its aims and membership. The conspirator's interest is likely to lie in misleading the listener into believing the conspiracy stronger with more members (and different

> members) and other aims than in fact it has. It is no victory for common sense to make a belief that criminals are notorious for their veracity the basis for law." Levie, Hearsay and Conspiracy, 52 Mich. L. Rev. 1159, 1165–1166 (1954).

The unreliability of co-conspirator declarations as trial evidence is not merely a product of the duplicity with which criminals often conduct their business. It also stems from the ambiguities that so often appear in all casual conversations, not just those of outlaws. See, *e. g., Dutton* v. *Evans, supra,* at 104 (MARSHALL, J., dissenting). And the difficulties one has in making sense of slang and dialect can be compounded where conspirators use private codes, as indeed they did in this case. Because of these problems, trained case agents are often hard pressed to piece together the facts of a criminal conspiracy from the confused tangle of conversations they have intercepted. The appearance of a co-conspirator declarant in court will allow the elimination of ambiguity that neither side has a right to profit from.

C

Consideration of the reasons why co-conspirator declarations have been exempted from the rule against hearsay only confirms doubts as to the reliability of the truth asserted in those statements. In contrast to other types of statements excepted from the rule, the co-conspirator declarations have not been admitted because of a belief in their special reliability. See Davenport, *supra,* at 1384–1385; Levie, *supra,* at 1161–1167. Rather, the root of the exemption lies in substantive law. Under the agency theory that supports conspiracy law, "once the conspiracy or combination is established, the act of one conspirator, in the prosecution of the enterprise, is considered the act of all, and is evidence against all." *United States* v. *Gooding,* 12 Wheat. 460, 469 (1827). Every statement of co-conspirators in furtherance of their illegal scheme is thus a verbal act admissible against each conspirator as if it had been his own.

This agency theory, which even the Advisory Committee on the proposed Federal Rules of Evidence labeled "at best a fiction," Advisory Committee Notes on Fed. Rule Evid. 801(d)(2)(E), 28 U. S. C. App., p. 718, might justify the exemption conferred upon co-conspirator declarations from the traditional rule against hearsay. But it speaks not at all to the Confrontation Clause's concern for reliable factfinding.

II

Without even attempting to argue that co-conspirator declarations have an inherent reliability that might justify their admission at trial when the declarant is not present in court for cross-examination, the majority instead supports its holding by arguing that "it is extremely unlikely that in-court testimony will recapture the evidentiary significance of statements made when the conspiracy was operating in full force." *Ante*, at 395. Indeed, the Court asserts, "co-conspirator statements derive much of their value from the fact that they are made in a context very different from trial, and therefore are usually irreplaceable as substantive evidence." *Ante*, at 395–396.

I truly cannot understand the majority's fear that a rule requiring the prosecution to do its best to produce a co-conspirator declarant in court would somehow deprive triers of fact of valuable evidence. Under this rule, if the prosecution could not in all good faith produce the declarant, the extrajudicial statements could come in, so long as they could be shown to have "adequate 'indicia of reliability,'" *Roberts*, 448 U. S., at 66. The majority's fear must therefore stem from a notion that if the prosecution is able to produce the declarant in court, his presence will somehow prevent the jury from hearing the truth. This conclusion overlooks the critical importance of cross-examination in the truth-seeking process.

If a declarant takes the stand, his out-of-court statements will still be admitted as evidence, so long as they are sufficiently reliable and there are no other grounds for their exclusion. And cross-examination will only enhance their value to the jury. The defendant will have a chance to inquire into the circumstances under which the statements were made and the motives that might have led the declarant to color their truth at the time. Cross-examination also may force the declarant to clarify ambiguous phrases and coded references. If anything he says is inconsistent with his prior statement, the declarant will no doubt advance some explanation for the inaccuracy of the extrajudicial statement—"an explanation a jury may be expected to understand and take into account in deciding which, if either, of the statements represents the truth," *California* v. *Green*, 399 U. S. 149, 159 (1970). Cf. *Nelson* v. *O'Neil* 402 U. S. 622, 627–629 (1971).

Whether or not a co-conspirator produced in court affirms, denies, or qualifies the truth of his out-of-court statement, his presence will contribute to the accuracy of the factfinding enterprise, the accuracy that is the primary concern of the Confrontation Clause. Whatever truth is contained in his extrajudicial declarations cannot be lost. It can only be supplemented by additional information of no less use to the triers of fact.

III

Recognizing that there may well be cases in which the cross-examination of a co-conspirator declarant is indispensable to a defendant's case, the Court reminds us that a defendant can always exercise his rights under the Compulsory Process Clause and call the declarant as his own witness. As long as this option remains open to a defendant, the Court reasons, "it is difficult to see what, if anything, is gained by a rule that requires the prosecution to make that declarant 'available.'" *Ante*, at 398. However, even assuming, as the Court seems to do, that the "good faith standard governing the state's obligation to produce defense witnesses [pursuant to the Compulsory Process Clause] is precisely the same one that governs the state's obligation to confront a defendant with the witnesses against him [pursuant to the Confrontation Clause]," Westen, Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases, 91 Harv. L. Rev. 567, 588 (1978), this is not a satisfactory response to respondent's Confrontation Clause claim.

The short answer to the majority's argument is that the Confrontation Clause gives a defendant a *right* to be confronted with the witnesses against him, not merely an opportunity to seek out witnesses on his own. As one court once noted of a situation similar to that presented in this case:

> "That [a co-conspirator declarant] was available to be called as a witness does not mitigate the prosecution's misconduct here. The State sought to shift to the defendant the risk of calling [the declarant] to the stand. To accept the State's argument that the availability of [the declarant] is the equivalent of putting him on the stand and subjecting him to cross-examination would severely alter the presumptions of innocence and the burdens of proof which protect the accused." *Hoover* v. *Beto*, 439 F. 2d 913, 924 (CA5 1971) (Wisdom, J.), rev'd on rehearing en banc, 467 F. 2d 516 (CA5) (over dissent of seven judges), cert. denied, 409 U. S. 1086 (1972).

See also *Dutton* v. *Evans*, 400 U. S., at 104 (MARSHALL, J., dissenting).

The disadvantages that the majority would impose upon a defendant are not merely theoretical. The Court notes the "significant practical burden" placed on the prosecution by a requirement that the Government identify co-conspirator declarants with specificity. *Ante*, at 399. As an illustration of the difficulties that the prosecution would be forced to face, the majority refers to *United States* v. *Ordonez*, 737 F. 2d 793 (CA9 1984), where the court found a Confrontation Clause violation in the Government's failure to identify the individuals who had made the entries in the "drug ledgers" introduced as evidence against the defendant. *Ante*, at 399, n. 13. However, the Court now places this "significant practical burden" upon the defendant, who may well be in no better a position to make such identifications. Even were it proper to assume the defendant's guilt and impute to him knowledge regarding pending charges, it can hardly be claimed that a defendant who has played but a minor role in a complex conspiracy necessarily has an intimate knowledge of the names and activities of his alleged co-conspirators.[2] "The prosecution therefore [should have] the burden of producing and calling to the witness stand the persons whose out-of-court statements it uses against the accused because, as between the two sides, the prosecution is in a better position to identify them and to initiate their production at that time." Westen, *supra*, at 616.

Even when a defendant is in as good a position as the prosecution to subpoena available declarants, a rule requiring him to call those declarants as his own witnesses may deny the defendant certain tactical advantages vouchsafed him by the Confrontation Clause. Under the regime established today, the only cross-examination that will attend the prosecution's introduction of co-conspirator declarations will be of whoever heard or recorded those statements and will focus merely on whether or not the statements were actually made. Any inquiry into the reliability of the statements must await the defendant's case. But if the defendant chooses to call the declarant as a defense witness, defendant risks bolstering in the jury's eyes the very conspiracy allegations he wishes to rebut. That the witness is viewed as hostile by the defendant, and has possibly been certified as such by the trial judge, does not necessarily mean that his relationship to the defendant will be so perceived by the jury, unless defense counsel chooses to dramatize the antagonism with hyperbole that might lose him the sympathy of the jury.

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[2] I realize that this was not the case here. However, the Court's holding addresses all cases involving co-conspirator declarations and thus extends to all the hypotheticals I discuss.

Moreover, even the harshest grilling of a declarant by the defense can occur only after the prosecution has rested its case. In a complex conspiracy trial, the time elapsing between the introduction of the hearsay and the cross-examination of the declarant may be quite substantial. During this time, the declarations will be unrebutted in jurors' minds. And their effect may actually be enhanced should either the defense or prosecution repeat the statements in the course of examining the declarant. In short, "[o]nly a lawyer without trial experience would suggest that the limited right to impeach one's own witness is the equivalent of that right to immediate cross-examination which has always been regarded as the greatest safeguard of American trial procedure." *New York Life Ins. Co.* v. *Taylor*, 79 U. S. App. D. C. 66, 74, 147 F. 2d 297, 305 (1945); see *United States* v. *Oates*, 560 F. 2d 45, 82, n. 39 (CA2 1977).

In federal prosecutions, there is an additional drawback. When a defendant calls a declarant as his own witness, he has no statutory right to obtain any prior statements of that declarant in the Government's possession—a right that attaches only "[a]fter a witness called by the United States has testified on direct examination," 18 U. S. C. § 3500.

In view of all the disadvantages that attend a defendant's decision to call a co-conspirator declarant as a witness, the majority's reliance on the defendant's right to compulsory process to justify a decision to deprive him of a critical aspect of his Confrontation Clause right cannot be supported. The two are simply not equivalent. Moreover, the majority's belief that an unavailability requirement would contribute nothing but a cast of unwanted supernumeraries has no basis in the realities of criminal prosecutions. There might be instances in which an available declarant is of so little value to either side that calling him as a witness would truly be an unnecessary exercise. See, *e. g.*, *Anderson* v. *United States*, 417 U. S. 211, 220, n. 11 (1974). But a defendant's failure to call a declarant as his own witness can in no way be taken as proof that such is the case.

IV

At bottom, today's decision rests upon the Court's judgment that a defendant's constitutional interest in subjecting the extrajudicial declarations of co-conspirators to the cross-examination that has traditionally been the primary guarantee of reliability in trials must be subordinated to considerations of prosecutorial efficiency. I do not believe the concerns of the Confrontation Clause should be so easily disregarded. The plight of Sir Walter Raleigh, condemned on the deposition of an alleged accomplice who had since recanted, may have loomed large in the eyes of those who drafted that constitutional guarantee. See F. Heller, The Sixth Amendment 104 (1951); Stephen, The Trial of Sir Walter Raleigh, in 2 Transactions of the Royal Historical Society 172 (4th series 1919). But the Framers, had they the prescience, would surely have been as apprehensive of the spectacle of a defendant's conviction upon the testimony of a handful of surveillance technicians and a very large box of tapes recording the boasts, faulty recollections, and coded or ambiguous utterances of outlaws. The Court's decision helps clear the way for this spectacle to become a common occurrence. I dissent.

MORAN, SUPERINTENDENT, RHODE ISLAND DEPARTMENT OF CORRECTIONS *v.* BURBINE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 84-1485. Argued November 13, 1985—Decided March 10, 1986

After respondent was arrested by the Cranston, Rhode Island, police in connection with a breaking and entering, the police obtained evidence suggesting that he might be responsible for the murder of a woman in Providence earlier that year. An officer telephoned the Providence police at approximately 6 p.m., and an hour later Providence police officers arrived at the Cranston headquarters to question respondent about the murder. That same evening, unknown to respondent, his sister, who was unaware that respondent was then under suspicion for murder, telephoned the Public Defender's Office to obtain legal assistance for her brother on the burglary charge. At 8:15 p.m., an Assistant Public Defender telephoned the Cranston detective division, stated that she would act as respondent's counsel if the police intended to question him, and was informed that he would not be questioned further until the next day. The attorney was not informed that the Providence police were there or that respondent was a murder suspect. Less than an hour later, the Providence police began a series of interviews with respondent, giving him warnings pursuant to *Miranda* v. *Arizona*, 384 U. S. 436, before each session and obtaining three signed waivers from him prior to eliciting three signed statements admitting to the murder. At all relevant times, respondent was unaware of his sister's efforts to retain counsel and of the attorney's telephone call, but at no time did he request an attorney. The state trial court denied his pretrial motion to suppress the statements, finding that he had validly waived his privilege against self-incrimination and his right to counsel. Respondent was convicted of first-degree murder, and the Rhode Island Supreme Court affirmed, rejecting the contention that the Fifth and Fourteenth Amendments required suppression of the statements. Respondent then unsuccessfully sought habeas corpus relief in Federal District Court, but the Court of Appeals reversed, holding that the police conduct in failing to inform respondent as to the attorney's call had fatally tainted his waivers of his Fifth Amendment privilege against self-incrimination and right to counsel.

Held:

1. The Court of Appeals erred in construing the Fifth Amendment to require the exclusion of respondent's confessions. The record supports the state-court findings that the Providence police followed *Miranda* procedures with precision in obtaining respondent's written waivers of his Fifth Amendment rights prior to eliciting the confessions. Pp. 420–428.

(a) The police's failure to inform respondent of the attorney's telephone call did not deprive him of information essential to his ability to knowingly waive his Fifth Amendment rights to remain silent and to the presence of counsel. Events occurring outside of a suspect's presence and entirely unknown to him can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right. Once it is demonstrated that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law. The level of the police's culpability—whether intentional or inadvertent—in failing to inform respondent of the telephone call has no bearing on the validity of the waivers. Pp. 421–424.

(b) *Miranda*'s reach will not be extended so as to require the reversal of a conviction if the police are less than forthright in their dealings with an attorney or if they fail to tell a suspect of an attorney's unilateral efforts to contact him. Reading *Miranda* to forbid police deception of an *attorney* would cut that decision loose from its rationale of guarding against abridgment of the *suspect's* Fifth Amendment rights. And, while a rule requiring that the police inform a suspect of an attorney's efforts to reach him might add marginally to *Miranda*'s goal of dispelling the compulsion inherent in custodial interrogation, overriding practical considerations—particularly the ease and clarity of *Miranda*'s application—counsel against adoption of the rule. Moreover, such a rule would work a substantial and inappropriate shift in the subtle balance struck in *Miranda* between society's legitimate law enforcement interests and the protection of the accused's Fifth Amendment rights. Pp. 424–428.

2. The conduct of the police did not violate respondent's Sixth Amendment right to counsel. That right initially attaches only after the first formal charging procedure, whereas the challenged police conduct here occurred prior to respondent's arraignment. The contention that the right to noninterference with an attorney's dealings with a criminal suspect arises the moment that the relationship is formed, or, at the very least, once the suspect is placed in custodial interrogation, is not supported by precedent. Moreover, such contention is both practically

and theoretically unsound. By its very terms, the Sixth Amendment becomes applicable only when the government's role shifts from investigation to accusation through the initiation of adversary judicial proceedings. The possibility that custodial interrogation may have important consequences at trial, standing alone, is insufficient to trigger the Sixth Amendment right to counsel. Pp. 428–432.

3. Nor was the asserted misconduct of the police—particularly the conveying of false information to the attorney—so offensive as to deprive respondent of the fundamental fairness guaranteed by the Due Process Clause of the Fourteenth Amendment. Although on facts more egregious than those presented here police deception might rise to a level of a due process violation, the conduct challenged here falls short of the kind of misbehavior that so shocks the sensibilities of civilized society as to warrant a federal intrusion into the criminal processes of the States. Pp. 432–434.

753 F. 2d 178, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 434.

Constance L. Messore, Special Assistant Attorney General of Rhode Island, argued the cause for petitioner. With her on the briefs was *Arlene Violet*, Attorney General.

Deputy Solicitor General Frey argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Acting Solicitor General Fried*, *Assistant Attorney General Trott*, *Andrew J. Pincus*, and *Sara Criscitelli*.

Robert B. Mann argued the cause for respondent. With him on the brief was *William F. Reilly*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of California et al. by *John K. Van de Kamp*, Attorney General of California, *Steve White*, Chief Assistant Attorney General, *Karl S. Mayer*, Assistant Attorney General, and *Ann K. Jensen* and *Dane R. Gillette*, Deputy Attorneys General, *Charles A. Graddick*, Attorney General of Alabama, *Norman C. Gorsuch*, Attorney General of Alaska, *Robert K. Corbin*, Attorney General of Arizona, *Duane Woodard*, Attorney General of Colorado, *Austin J. McGuigan*, Chief State's Attorney of Connecticut, *Charles M. Oberly III*, Attorney General of Delaware, *Neil F. Hartigan*, Attorney General

JUSTICE O'CONNOR delivered the opinion of the Court.

After being informed of his rights pursuant to *Miranda* v. *Arizona*, 384 U. S. 436 (1966), and after executing a series of written waivers, respondent confessed to the murder of a young woman. At no point during the course of the interrogation, which occurred prior to arraignment, did he request an attorney. While he was in police custody, his sister attempted to retain a lawyer to represent him. The attorney telephoned the police station and received assurances that respondent would not be questioned further until the next day. In fact, the interrogation session that yielded the inculpatory statements began later that evening. The question presented is whether either the conduct of the police or respond-

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of Illinois, *Linley E. Pearson*, Attorney General of Indiana, *Robert T. Stephan*, Attorney General of Kansas, *William J. Guste, Jr.*, Attorney General of Louisiana, *James E. Tierney*, Attorney General of Maine, *Stephen H. Sachs*, Attorney General of Maryland, *Stanley D. Steinborn*, Attorney General of Michigan, *William L. Webster*, Attorney General of Missouri, *Mike Greeley*, Attorney General of Montana, *Stephen E. Merrill*, Attorney General of New Hampshire, *Irwin I. Kimmelman*, Attorney General of New Jersey, *Lacy H. Thornburg*, Attorney General of North Carolina, *Nicholas J. Spaeth*, Attorney General of North Dakota, *Leroy S. Zimmerman*, Attorney General of Pennsylvania, *Travis Medlock*, Attorney General of South Carolina, *Mark V. Meierhenry*, Attorney General of South Dakota, *W. J. Michael Cody*, Attorney General of Tennessee, *Jim Mattox*, Attorney General of Texas, *Gerald L. Baliles*, Attorney General of Virginia, *Jeffrey L. Amestoy*, Attorney General of Vermont, *Charlie Brown*, Attorney General of West Virginia, *Bronson C. La Follette*, Attorney General of Wisconsin, *A. G. McClintock*, Attorney General of Wyoming, *Richard G. Opper*, Attorney General of Guam, *J'Ada M. Finch-Sheen*, Attorney General of the Virgin Islands, and *Jack E. Yelverton;* and for Americans for Effective Law Enforcement, Inc., by *David Crump, Daniel B. Hales, Fred E. Inbau, Wayne W. Schmidt*, and *James P. Manak*.

Briefs of *amici curiae* urging affirmance were filed for the American Bar Association by *William W. Falsgraf, Steven H. Goldblatt*, and *Charles G. Cole;* for the National Association of Criminal Defense Lawyers et al. by *Judith H. Mizner, Nancy Gertner*, and *Scott Baldwin;* and for the National Legal Aid and Defender Association et al. by *Kim R. Fawcett, James R. Neuhard, Jack D. Novik*, and *John A. MacFadyen*.

ent's ignorance of the attorney's efforts to reach him taints the validity of the waivers and therefore requires exclusion of the confessions.

I

On the morning of March 3, 1977, Mary Jo Hickey was found unconscious in a factory parking lot in Providence, Rhode Island. Suffering from injuries to her skull apparently inflicted by a metal pipe found at the scene, she was rushed to a nearby hospital. Three weeks later she died from her wounds.

Several months after her death, the Cranston, Rhode Island, police arrested respondent and two others in connection with a local burglary. Shortly before the arrest, Detective Ferranti of the Cranston police force had learned from a confidential informant that the man responsible for Ms. Hickey's death lived at a certain address and went by the name of "Butch." Upon discovering that respondent lived at that address and was known by that name, Detective Ferranti informed respondent of his *Miranda* rights. When respondent refused to execute a written waiver, Detective Ferranti spoke separately with the two other suspects arrested on the breaking and entering charge and obtained statements further implicating respondent in Ms. Hickey's murder. At approximately 6 p.m., Detective Ferranti telephoned the police in Providence to convey the information he had uncovered. An hour later, three officers from that department arrived at the Cranston headquarters for the purpose of questioning respondent about the murder.

That same evening, at about 7:45 p.m., respondent's sister telephoned the Public Defender's Office to obtain legal assistance for her brother. Her sole concern was the breaking and entering charge, as she was unaware that respondent was then under suspicion for murder. She asked for Richard Casparian who had been scheduled to meet with respondent earlier that afternoon to discuss another charge unrelated to either the break-in or the murder. As soon as the conversation ended, the attorney who took the call attempted to reach Mr. Casparian. When those efforts were unsuccessful, she telephoned Allegra Munson, another Assistant Public Defender, and told her about respondent's arrest and his sister's subsequent request that the office represent him.

At 8:15 p.m., Ms. Munson telephoned the Cranston police station and asked that her call be transferred to the detective division. In the words of the Supreme Court of Rhode Island, whose factual findings we treat as presumptively correct, 28 U. S. C. § 2254(d), the conversation proceeded as follows:

> "A male voice responded with the word 'Detectives.' Ms. Munson identified herself and asked if Brian Burbine was being held; the person responded affirmatively. Ms. Munson explained to the person that Burbine was represented by attorney Casparian who was not available; she further stated that she would act as Burbine's legal counsel in the event that the police intended to place him in a lineup or question him. The unidentified person told Ms. Munson that the police would not be questioning Burbine or putting him in a lineup and that they were through with him for the night. Ms. Munson was not informed that the Providence Police were at the Cranston police station or that Burbine was a suspect in Mary's murder." *State* v. *Burbine*, 451 A. 2d 22, 23–24 (1982).

At all relevant times, respondent was unaware of his sister's efforts to retain counsel and of the fact and contents of Ms. Munson's telephone conversation.

Less than an hour later, the police brought respondent to an interrogation room and conducted the first of a series of interviews concerning the murder. Prior to each session, respondent was informed of his *Miranda* rights, and on three separate occasions he signed a written form acknowledging that he understood his right to the presence of an attorney and explicitly indicating that he "[did] not want an attorney called or appointed for [him]" before he gave a statement. App. to Pet. for Cert. 94, 103, 107. Uncontradicted evidence at the suppression hearing indicated that at least twice during the course of the evening, respondent was left in a room where he had access to a telephone, which he apparently declined to use. Tr. of Suppression Hearing 23, 85. Eventually, respondent signed three written statements fully admitting to the murder.

Prior to trial, respondent moved to suppress the statements. The court denied the motion, finding that respondent had received the *Miranda* warnings and had "knowingly, intelligently, and voluntarily waived his privilege against self-incrimination [and] his right to counsel." App. to Pet. for Cert. 116. Rejecting the contrary testimony of the police, the court found that Ms. Munson did telephone the detective bureau on the evening in question, but concluded that "there was no . . . conspiracy or collusion on the part of the Cranston Police Department to secrete this defendant from his attorney." *Id.*, at 114. In any event, the court held, the constitutional right to request the presence of an attorney belongs solely to the defendant and may not be asserted by his lawyer. Because the evidence was clear that respondent never asked for the services of an attorney, the telephone call had no relevance to the validity of the waiver or the admissibility of the statements.

The jury found respondent guilty of murder in the first degree, and he appealed to the Supreme Court of Rhode Island. A divided court rejected his contention that the Fifth and Fourteenth Amendments to the Constitution required the suppression of the inculpatory statements and affirmed the conviction. Failure to inform respondent of Ms. Munson's efforts to represent him, the court held, did not undermine the validity of the waivers. "It hardly seems conceivable that the additional information that an attorney whom he did not know had called the police station would have added significantly to the quantum of information necessary for the accused to make an informed decision as to waiver." *State* v. *Burbine* 451 A. 2d 22, 29 (1982). Nor, the court concluded, did *Miranda* v. *Arizona*, or any other decision of this Court independently require the police to honor Ms. Munson's request that interrogation not proceed in her absence. In reaching that conclusion, the court noted that because two different police departments were operating in the Cranston station house on the evening in question, the record supported the trial court's finding that there was no "conspiracy or collusion" to prevent Ms. Munson from seeing respondent. 451 A. 2d, at 30, n. 5. In any case, the court held, the right to the presence of counsel belongs solely to the accused and may not be asserted by "benign third parties, whether or not they happen to be attorneys." *Id.*, at 28.

After unsuccessfully petitioning the United States District Court for the District of Rhode Island for a writ of habeas corpus, 589 F. Supp. 1245 (1984), respondent appealed to the Court of Appeals for the First Circuit. That court reversed. 753 F. 2d 178 (1985). Finding it unnecessary to reach any arguments under the Sixth and Fourteenth Amendments, the court held that the police's conduct had fatally tainted respondent's "otherwise valid" waiver of his Fifth Amendment privilege against self-incrimination and right to counsel. *Id.*, at 184. The court reasoned that by failing to inform respondent that an attorney had called and that she had been assured that no questioning would take place until the next day, the police had deprived respondent of information crucial to his ability to waive his rights knowingly and intelligently. The court also found that the record would support "no other explanation for the refusal to tell Burbine of Attorney Munson's call than . . . deliberate or reckless irresponsibility." *Id.*, at 185. This kind of "blameworthy action by the police," the court concluded, together with respondent's ignorance of the telephone call, "vitiate[d] any claim that [the] waiver of counsel was knowing and voluntary." *Id.*, at 185, 187.

We granted certiorari to decide whether a prearraignment confession preceded by an otherwise valid waiver must be suppressed either because the police misinformed an inquiring attorney about their plans concerning the suspect or because they failed to inform the suspect of the attorney's efforts to reach him. 471 U. S. 1098 (1985). We now reverse.

II

In *Miranda* v. *Arizona*, the Court recognized that custodial interrogations, by their very nature, generate "compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." 384 U. S., at 467. To combat this inherent compulsion, and thereby protect the Fifth Amendment privilege against self-incrimination, *Miranda* imposed on the police an obligation to follow certain procedures in their dealings with the accused. In particular, prior to the initiation of questioning, they must fully apprise the suspect of the State's intention to use his statements to secure a conviction, and must inform him of his rights to remain silent and to "have counsel present . . . if [he] so desires." *Id.*, at 468–470. Beyond this duty to inform, *Miranda* requires that the police respect the accused's decision to exercise the rights outlined in the warnings. "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, [or if he] states that he wants an attorney, the interrogation must cease." *Id.*, at 473–474. See also *Edwards* v. *Arizona*, 451 U. S. 477 (1981).

Respondent does not dispute that the Providence police followed these procedures with precision. The record amply supports the state-court findings that the police administered the required warnings, sought to assure that respondent understood his rights, and obtained an express written waiver prior to eliciting each of the three statements. Nor does respondent contest the Rhode Island courts' determination that he at no point requested the presence of a lawyer.

He contends instead that the confessions must be suppressed because the police's failure to inform him of the attorney's telephone call deprived him of information essential to his ability to knowingly waive his Fifth Amendment rights. In the alternative, he suggests that to fully protect the Fifth Amendment values served by *Miranda*, we should extend that decision to condemn the conduct of the Providence police. We address each contention in turn.

A

Echoing the standard first articulated in *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938), *Miranda* holds that "[t]he defendant may waive effectuation" of the rights conveyed in the warnings "provided the waiver is made voluntarily, knowingly and intelligently." 384 U. S., at 444, 475. The inquiry has two distinct dimensions. *Edwards* v. *Arizona*, *supra*, at 482; *Brewer* v. *Williams*, 430 U. S. 387, 404 (1977). First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. *Fare* v. *Michael C.*, 442 U. S. 707, 725 (1979). See also *North Carolina* v. *Butler*, 441 U. S. 369, 374–375 (1979).

Under this standard, we have no doubt that respondent validly waived his right to remain silent and to the presence of counsel. The voluntariness of the waiver is not at issue. As the Court of Appeals correctly acknowledged, the record is devoid of any suggestion that police resorted to physical or psychological pressure to elicit the statements. 753 F. 2d, at 184. Indeed it appears that it was respondent, and not the police, who spontaneously initiated the conversation that led to the first and most damaging confession. *Id.*, at 180. Cf. *Edwards* v. *Arizona, supra.* Nor is there any question about respondent's comprehension of the full panoply of rights set out in the *Miranda* warnings and of the potential consequences of a decision to relinquish them. Nonetheless, the Court of Appeals believed that the "[d]eliberate or reckless" conduct of the police, in particular their failure to inform respondent of the telephone call, fatally undermined the validity of the otherwise proper waiver. 753 F. 2d, at 187. We find this conclusion untenable as a matter of both logic and precedent.

Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right. Under the analysis of the Court of Appeals, the same defendant, armed with the same information and confronted with precisely the same police conduct, would have knowingly waived his *Miranda* rights had a lawyer not telephoned the police station to inquire about his status. Nothing in any of our waiver decisions or in our understanding of the essential components of a valid waiver requires so incongruous a result. No doubt the additional information would have been useful to respondent; perhaps even it might have affected his decision to confess. But we have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights. See, *e. g.*, *Oregon* v. *Elstad*, 470 U. S. 298, 316–317 (1985); *United States* v. *Washington*, 431 U. S. 181, 188 (1977). Cf. *Hill* v. *Lockhart*, 474 U. S. 52, 56 (1985); *McMann* v. *Richardson*, 397 U. S. 759, 769 (1970). Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law.[1] The Court of Appeals' conclusion to the contrary was in error.

Nor do we believe that the level of the police's culpability in failing to inform respondent of the telephone call has any bearing on the validity of the waivers. In light of the state-court findings that there was no "conspiracy or collusion" on the part of the police, 451 A. 2d, at 30, n. 5, we have serious doubts about whether the Court of Appeals was free to conclude that their conduct constituted "deliberate or reckless irresponsibility." 753 F. 2d, at 185; see 28 U. S. C. § 2254(d). But whether intentional or inadvertent, the state of mind of the police is irrelevant to the question of the intelligence and voluntariness of respondent's election to abandon his rights. Although highly inappropriate, even deliberate deception of an attorney could not possibly affect a suspect's decision to waive his *Miranda* rights unless he were at least aware of the incident. Compare *Escobedo* v. *Illinois*, 378 U. S. 478, 481 (1964) (excluding confession where police incorrectly told the *suspect* that his lawyer "'didn't want to see' him"). Nor was the failure to inform respondent of the telephone call the kind of "trick[ery]" that can vitiate the validity of a waiver. *Miranda*, 384 U. S., at 476. Granting that the "deliberate or reckless" withholding of information is objectionable as a matter of ethics, such conduct is only relevant to the constitutional validity of a waiver if it deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them. Because respondent's voluntary decision to speak was made with full awareness and comprehension of all the information *Miranda* requires the police to convey, the waivers were valid.

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[1] The dissent incorrectly reads our analysis of the components of a valid waiver to be inconsistent with the Court's holding in *Edwards* v. *Arizona*, 451 U. S. 477 (1981). *Post*, at 452. When a suspect *has* requested counsel, the interrogation must cease, regardless of any question of waiver, unless the suspect himself initiates the conversation. In the course of its lengthy exposition, however, the dissent never comes to grips with the crucial distinguishing feature of this case—that Burbine at no point requested the presence of counsel, as was his right under *Miranda* to do. We do not quarrel with the dissent's characterization of police interrogation as a "privilege terminable at the will of the suspect." *Post*, at 458. We reject, however, the dissent's entirely undefended suggestion that the Fifth Amendment "right to counsel" requires anything more than that the police inform the suspect of his right to representation and honor his request that the interrogation cease until his attorney is present. See, *e. g.*, *Michigan* v. *Mosley*, 423 U. S. 96, 104, n. 10 (1975).

B

At oral argument respondent acknowledged that a constitutional rule requiring the police to inform a suspect of an attorney's efforts to reach him would represent a significant extension of our precedents. Tr. of Oral Arg. 32–33. He contends, however, that the conduct of the Providence police was so inimical to the Fifth Amendment values *Miranda* seeks to protect that we should read that decision to condemn their behavior. Regardless of any issue of waiver, he urges, the Fifth Amendment requires the reversal of a conviction if the police are less than forthright in their dealings with an attorney or if they fail to tell a suspect of a lawyer's unilateral efforts to contact him. Because the proposed modification ignores the underlying purposes of the *Miranda* rules and because we think that the decision as written strikes the proper balance between society's legitimate law enforcement interests and the protection of the defendant's Fifth Amendment rights, we decline the invitation to further extend *Miranda*'s reach.

At the outset, while we share respondent's distaste for the deliberate misleading of an officer of the court, reading *Miranda* to forbid police deception of an *attorney* "would cut [the decision] completely loose from its own explicitly stated rationale." *Beckwith* v. *United States*, 425 U. S. 341, 345 (1976). As is now well established, "[t]he . . . *Miranda* warnings are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the [suspect's] right against compulsory self-incrimination [is] protected.'" *New York* v. *Quarles*, 467 U. S. 649, 654 (1984), quoting *Michigan* v. *Tucker*, 417 U. S. 433, 444 (1974). Their objective is not to mold police conduct for its own sake. Nothing in the Constitution vests in us the authority to mandate a code of behavior for state officials wholly unconnected to any federal right or privilege. The purpose of the *Miranda* warnings instead is to dissipate the compulsion inherent in custodial interrogation and, in so doing, guard against abridgment of the suspect's Fifth Amendment rights. Clearly, a rule that focuses on how the police treat an attorney—conduct that has no relevance at all to the degree of compulsion experienced by the defendant during interrogation—would ignore both *Miranda*'s mission and its only source of legitimacy.

Nor are we prepared to adopt a rule requiring that the police inform a suspect of an attorney's efforts to reach him. While such a rule might add marginally to *Miranda*'s goal of dispelling the compulsion inherent in custodial interrogation, overriding practical considerations counsel against its adoption. As we have stressed on numerous occasions, "[o]ne of the principal advantages" of *Miranda* is the ease and clarity of its application. *Berkemer* v. *McCarty*, 468 U. S. 420, 430 (1984); see also *New York* v. *Quarles*, *supra*, at 662–664 (concurring opinion); *Fare* v. *Michael C.*, 442 U. S., at 718. We have little doubt that the approach urged by respondent and endorsed by the Court of Appeals would have the inevitable consequence of muddying *Miranda*'s otherwise relatively clear waters. The legal questions it would spawn are legion: To what extent should the police be held accountable for knowing that the accused has counsel? Is it enough that someone in the station house knows, or must the interrogating officer himself know of counsel's efforts to contact the suspect? Do counsel's efforts to talk to the suspect concerning one criminal investigation trigger the obligation to inform the defendant before interrogation may proceed on a wholly separate matter? We are unwilling to modify *Miranda* in a manner that would so clearly undermine the decision's central "virtue of informing police and prosecutors with specificity . . . what they may do in conducting [a] custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible." *Fare* v. *Michael C.*, *supra*, at 718.

Moreover, problems of clarity to one side, reading *Miranda* to require the police in each instance to inform a suspect of an attorney's efforts to reach him would work a substantial and, we think, inappropriate shift in the subtle balance struck in that decision. Custodial interrogations implicate two competing concerns. On the one hand, "the need for police questioning as a tool for effective enforcement of criminal laws" cannot be doubted. *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 225 (1973). Admissions of guilt are more than merely "desirable," *United States* v. *Washington*, 431 U. S., at 186; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law. On the other hand, the Court has recognized that the interrogation process is "inherently coercive" and that, as a consequence, there exists a substantial risk that the police will inadvertently traverse the fine line between legitimate efforts to elicit admissions and constitutionally impermissible compulsion. *New York* v. *Quarles*, *supra*, at 656. *Miranda* attempted to reconcile these opposing concerns by giving the *defendant* the power to exert some control over the course of the interrogation. Declining to adopt the more extreme position that the actual presence of a lawyer was necessary to dispel the coercion inherent in custodial interrogation, see Brief for American Civil Liberties Union as *Amicus Curiae* in *Miranda* v. *Arizona*, O. T. 1965, No. 759, pp. 22–31, the Court found that the suspect's Fifth Amendment rights could be adequately protected by less intrusive means. Police questioning, often an essential part of the investigatory process, could continue in its traditional form, the Court held, but only if the suspect clearly understood that, at any time, he could bring the proceeding to a halt or, short of that, call in an attorney to give advice and monitor the conduct of his interrogators.

The position urged by respondent would upset this carefully drawn approach in a manner that is both unnecessary for the protection of the Fifth Amendent privilege and injurious to legitimate law enforcement. Because, as *Miranda* holds, full comprehension of the rights to remain silent and request an attorney are sufficient to dispel whatever coercion is inherent in the interrogation process, a rule requiring the police to inform the suspect of an attorney's efforts to contact him would contribute to the protection of the Fifth Amendment privilege only incidentally, if at all. This minimal benefit, however, would come at a substantial cost to society's legitimate and substantial interest in securing admissions of guilt. Indeed, the very premise of the Court of Appeals was not that awareness of Ms. Munson's phone call would have dissipated the coercion of the interrogation room, but that it might have convinced respondent not to speak at all. 753 F. 2d, at 185. Because neither the letter nor purposes of *Miranda* require this additional handicap on otherwise permissible investigatory efforts, we are unwilling to expand the *Miranda* rules to require the police to keep the suspect abreast of the status of his legal representation.

We acknowledge that a number of state courts have reached a contrary conclusion. Compare *State* v. *Jones*, 19 Wash. App. 850, 578 P. 2d 71 (1978), with *State* v. *Beck*, 687 S. W. 2d 155 (Mo. 1985) (en banc). We recognize also that our interpretation of the Federal Constitution, if given the dissent's expansive gloss, is at odds with the policy recommendations embodied in the American Bar Association Standards of Criminal Justice. Cf. ABA Standards for Criminal Justice 5–7.1 (2d ed. 1980). Notwithstanding the dissent's protestations, however, our interpretive duties go well beyond deferring to the numerical preponderance of lower court decisions or to the subconstitutional recommendations of even so esteemed a body as the American Bar Association. See *Nix* v. *Whiteside*, *ante*, at 189 (BLACKMUN, J., concurring in judgment). Nothing we say today disables the States from adopting different requirements for the conduct of its employees and officials as a matter of state law. We hold only that the Court of Appeals erred in construing the Fifth Amendment to the Federal Constitution to require the exclusion of respondent's three confessions.

III

Respondent also contends that the Sixth Amendment requires exclusion of his three confessions.[2] It is clear, of course, that, absent a valid waiver, the defendant has the right to the presence of an attorney during any interrogation occurring after the first formal charging proceeding, the point at which the Sixth Amendment right to counsel initially attaches. *United States* v. *Gouveia*, 467 U. S. 180, 187 (1984); *Kirby* v. *Illinois*, 406 U. S. 682, 689 (1972) (opinion of Stewart, J.). See *Brewer* v. *Williams*, 430 U. S., at 400–401. And we readily agree that once the right *has* attached, it follows that the police may not interfere with the efforts of a defendant's attorney to act as a "'medium' between [the suspect] and the State" during the interrogation. *Maine* v. *Moulton*, 474 U. S. 159, 176 (1985); see *Brewer* v. *Williams*, *supra*, at 401, n. 8. The difficulty for respondent is that the interrogation sessions that yielded the inculpatory statements took place *before* the initiation of "adversary judicial proceedings." *United States* v. *Gouveia*, *supra*, at 192. He contends, however, that this circumstance is not fatal to his Sixth Amendment claim. At least in some situations, he argues, the Sixth Amendment protects the integrity of the attorney-client relationship[3] regardless of whether the prosecution has in fact commenced "by way of formal charge, preliminary hearing, indictment, information or arraignment." 467 U. S., at 188. Placing principal reliance on a footnote in *Miranda*, 384 U. S., at 465, n. 35, and on *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), he maintains that *Gouveia*, *Kirby*, and our other "critical stage" cases, concern only the narrow question of when the right *to* counsel—that is, to the appointment or presence of counsel—attaches. The right to noninterference with an attorney's dealings with a criminal suspect, he asserts, arises the moment that the relationship is formed, or, at the very least, once the defendant is placed in custodial interrogation.

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[2] Petitioner does not argue that respondent's valid waiver of his Fifth Amendment right to counsel necessarily served to waive his parallel rights under the Sixth Amendment. Accordingly, we have no occasion to consider whether a waiver for one purpose necessarily operates as a general waiver of the right to counsel for all purposes.

We are not persuaded. At the outset, subsequent decisions foreclose any reliance on *Escobedo* and *Miranda* for the proposition that the Sixth Amendment right, in any of its manifestations, applies prior to the initiation of adversary judicial proceedings. Although *Escobedo* was originally decided as a Sixth Amendment case, "the Court in retrospect perceived that the 'prime purpose' of *Escobedo* was not to vindicate the constitutional right to counsel as such, but, like *Miranda*, 'to guarantee full effectuation of the privilege against self-incrimination . . . .'" *Kirby* v. *Illinois*, *supra*, at 689, quoting *Johnson* v. *New Jersey*, 384 U. S. 719, 729 (1966). Clearly then, *Escobedo* provides no support for respondent's argument. Nor, of course, does *Miranda*, the holding of which rested exclusively on the Fifth Amendment. Thus, the decision's brief observation about the reach of *Escobedo*'s Sixth Amendment analysis is not only dictum, but reflects an understanding of the case that the Court has expressly disavowed. See also, *United States* v. *Gouveia*, *supra*, at 188, n. 5; Y. Kamisar, Police Interrogation and Confessions 217–218, n. 94 (1980).

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[3] Notwithstanding the Rhode Island Supreme Court's finding that, as a matter of state law, no attorney-client relationship existed between respondent and Ms. Munson, the Sixth Amendment issue is properly before us. *State* v. *Burbine*, 451 A. 2d 22, 29 (1982). Petitioner now concedes that such a relationship existed and invites us to decide the Sixth Amendment question based on that concession. Of course, a litigant's concession cannot be used to circumvent the rule that this Court may not disregard a state court's interpretation of state law. Respondent's argument, however, does not focus on whether an attorney-client relationship actually existed as a formal matter of state law. He argues instead that, on the particular facts of this case, the Sixth Amendment right to counsel has been violated. In any event, even if the existence of an attorney-client relationship could somehow independently trigger the Sixth Amendment right to counsel, a position we reject, the type of circumstances that would give rise to the right would certainly have a federal definition.

Questions of precedent to one side, we find respondent's understanding of the Sixth Amendment both practically and theoretically unsound. As a practical matter, it makes little sense to say that the Sixth Amendment right to counsel attaches at different times depending on the fortuity of whether the suspect or his family happens to have retained counsel prior to interrogation. Cf. *id.*, at 220–221. More importantly, the suggestion that the existence of an attorney-client relationship itself triggers the protections of the Sixth Amendment misconceives the underlying purposes of the right to counsel. The Sixth Amendment's intended function is not to wrap a protective cloak around the attorney-client relationship for its own sake any more than it is to protect a suspect from the consequences of his own candor. Its purpose, rather, is to assure that in any "criminal prosecutio[n]," U. S. Const., Amdt. 6, the accused shall not be left to his own devices in facing the "'prosecutorial forces of organized society.'" *Maine* v. *Moulton*, *supra*, at 170 (quoting *Kirby* v. *Illinois*, 406 U. S., at 689). By its very terms, it becomes applicable only when the government's role shifts from investigation to accusation. For it is only then that the assistance of one versed in the "intricacies . . . of law," *ibid.*, is needed to assure that the prosecution's case encounters "the crucible of meaningful adversarial testing." *United States* v. *Cronic*, 466 U. S. 648, 656 (1984).

Indeed, in *Maine* v. *Moulton*, decided this Term, the Court again confirmed that looking to the initiation of adversary judicial proceedings, far from being mere formalism, is fundamental to the proper application of the Sixth Amendment right to counsel. There, we considered the constitutional implications of a surreptitious investigation that yielded evidence pertaining to two crimes. For one, the defendant had been indicted; for the other, he had not. Concerning the former, the Court reaffirmed that after the first charging proceeding the government may not deliberately elicit incriminating statements from an accused out of the presence of counsel. See also *Massiah* v. *United States*, 377 U. S. 201 (1964). The Court made clear, however, that the evidence concerning the crime for which the defendant had not been indicted—evidence obtained in precisely the same manner from the identical suspect—would be admissible at a trial limited to those charges. *Maine* v. *Moulton*, 474 U. S., at 180, and n. 16. The clear implication of the holding, and one that confirms the teaching of *Gouveia*, is that the Sixth Amendment right to counsel does not attach until after the initiation of formal charges. Moreover, because Moulton already had legal representation, the decision all but forecloses respondent's argument that the attorney-client relationship itself triggers the Sixth Amendment right.

Respondent contends, however, that custodial interrogations require a different rule. Because confessions elicited during the course of police questioning often seal a suspect's fate, he argues, the need for an advocate—and the concomitant right to noninterference with the attorney-client relationship—is at its zenith, regardless of whether the State has initiated the first adversary judicial proceeding. We do not doubt that a lawyer's presence could be of value to the suspect; and we readily agree that if a suspect confesses, his attorney's case at trial will be that much more difficult. But these concerns are no more decisive in this context than they were for the equally damaging preindictment lineup at issue in *Kirby*, or the statements pertaining to the unindicted crime elicted from the defendant in *Maine* v. *Moulton*. Compare *United States* v. *Wade*, 388 U. S. 218, 226–227 (1967) (Sixth Amendment attaches at postindictment lineup); *Massiah* v. *United States*, *supra* (after indictment, police may not elicit statements from suspect out of the presence of counsel). For an interrogation, no more or less than for any other "critical" pretrial event, the possibility that the encounter may have important consequences at trial, standing alone, is insufficient to trigger the Sixth Amendment right to counsel. As *Gouveia* made clear, until such time as the "'government has committed itself to prosecute, and . . . the adverse positions of government and defendant have solidified'" the Sixth Amendment right to counsel does not attach. 467 U. S., at 189 (quoting *Kirby* v. *Illinois*, *supra*, at 689).

Because, as respondent acknowledges, the events that led to the inculpatory statements preceded the formal initiation of adversary judicial proceedings, we reject the contention that the conduct of the police violated his rights under the Sixth Amendment.

IV

Finally, respondent contends that the conduct of the police was so offensive as to deprive him of the fundamental fairness guaranteed by the Due Process Clause of the Fourteenth Amendment. Focusing primarily on the impropriety of conveying false information to an attorney, he invites us to declare that such behavior should be condemned as violative of canons fundamental to the "'traditions and conscience of our people.'" *Rochin* v. *California*, 342 U. S. 165, 169 (1952), quoting *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934). We do not question that on facts more egregious than those presented here police deception might rise to a level of a due process violation. Accordingly, JUSTICE STE-

VENS' apocalyptic suggestion that we have approved any and all forms of police misconduct is demonstrably incorrect.[4] We hold only that, on these facts, the challenged conduct falls short of the kind of misbehavior that so shocks the sensibilities of civilized society as to warrant a federal intrusion into the criminal processes of the States.

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[4] Among its other failings, the dissent declines to follow *Oregon* v. *Elstad*, 470 U. S. 298 (1985), a decision that categorically forecloses JUSTICE STEVENS' major premise—that *Miranda* requires the police to inform a suspect of any and all information that would be useful to a decision whether to remain silent or speak with the police. See also *United States* v. *Washington*, 431 U. S. 181, 188 (1977). The dissent also launches a novel "agency" theory of the Fifth Amendment under which any perceived deception of a lawyer is automatically treated as deception of his or her client. This argument entirely disregards the elemental and established proposition that the privilege against compulsory self-incrimination is, by hypothesis, a personal one that can only be invoked by the individual whose testimony is being compelled.

Most importantly, the dissent's misreading of *Miranda* itself is breathtaking in its scope. For example, it reads *Miranda* as creating an undifferentiated right to the presence of an attorney that is triggered automatically by the initiation of the interrogation itself. *Post*, at 463. Yet, as both *Miranda* and subsequent decisions construing *Miranda* make clear beyond refute, "'the interrogation must cease until an attorney is present' *only* '[i]f the individual states that he wants an attorney.'" *Michigan* v. *Mosley*, 423 U. S. 96, 104, n. 10 (1975) (emphasis added), quoting *Miranda*, 384 U. S., at 474. The dissent condemns us for embracing "incommunicado questioning . . . as a societal goal of the highest order that justifies police deception of the shabbiest kind." *Post*, at 439. We, of course, do nothing of the kind. As any reading of *Miranda* reveals, the decision, rather than proceeding from the premise that the rights and needs of the defendant are paramount to all others, embodies a carefully crafted balance designed to fully protect *both* the defendant's and society's interests. The dissent may not share our view that the Fifth Amendment rights of the defendant are amply protected by application of *Miranda as written*. But the dissent is "simply wrong," *post*, at 452, in suggesting that exclusion of Burbine's three confessions follows perfunctorily from *Miranda*'s mandate. Y. Kamisar, Police Interrogation and Confessions 217–218, n. 94 (1980).

Quite understandably, the dissent is outraged by the very idea of police deception of a lawyer. Significantly less understandable is its willingness to misconstrue this Court's constitutional holdings in order to implement its subjective notions of sound policy.

We hold therefore that the Court of Appeals erred in finding that the Federal Constitution required the exclusion of the three inculpatory statements. Accordingly, we reverse and remand for proceedings consistent with this opinion.

So ordered.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

This case poses fundamental questions about our system of justice. As this Court has long recognized, and reaffirmed only weeks ago, "ours is an accusatorial and not an inquisitorial system." *Miller* v. *Fenton*, 474 U. S. 104, 110 (1985).[1] The Court's opinion today represents a startling departure from that basic insight.

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[1] Justice Frankfurter succinctly explained the character of that distinction in his opinion in *Watts* v. *Indiana*, 338 U. S. 49, 54 (1949):

"Ours is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the Continent whereby an accused was interrogated in secret for hours on end. See Ploscowe, *The Development of Present-Day Criminal Procedures in Europe and America*, 48 Harv. L. Rev. 433, 457–458, 467–473 (1935). Under our system society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation. 'The law will not suffer a prisoner to be made the deluded instrument of his own conviction.' 2 Hawkins, Pleas of the Crown, c. 46, § 34 (8th ed. 1824). The requirement of specific charges, their proof beyond a reasonable doubt, the protection of the accused from confessions extorted through whatever form of police pressures, the right to a prompt hearing before a magistrate, the right to assistance of counsel, to be supplied by government when circumstances make it necessary, the duty to advise an accused of his constitutional rights—these are all characteristics of the accusatorial system and manifestations of its demands. Protracted, systematic and uncontrolled subjection of an accused to interrogation by the police for the purpose of eliciting disclosures or confession is subversive of the accusatorial system."

The Court concludes that the police may deceive an attorney by giving her false information about whether her client will be questioned, and that the police may deceive a suspect by failing to inform him of his attorney's communications and efforts to represent him.[2] For the majority, this conclusion, though "distaste[ful]," *ante*, at 424, is not even debatable. The deception of the attorney is irrelevant because the attorney has no right to information, accuracy, honesty, or fairness in the police response to her questions about her client. The deception of the client is acceptable, because, although the information would affect the client's assertion of his rights, the client's actions in ignorance of the availability of his attorney are voluntary, knowing, and intelligent; additionally, society's interest in apprehending, prosecuting, and punishing criminals outweighs the suspect's interest in information regarding his attorney's efforts to communicate with him. Finally, even mendacious police interference in the communications between a suspect and his lawyer does not violate any notion of fundamental fairness because it does not shock the conscience of the majority.

The case began in March 1977 with the discovery of Mary Jo Hickey, unconscious and disheveled in a deserted parking lot, lying in a pool of blood, with semen on her clothes, her dentures broken, and a piece of heavy, bloodstained metal nearby. Days later, Brian Burbine, then 20 years old, went to Maine and stayed with friends. According to the friends' testimony at trial, he was upset, and described a night out with Hickey, who was then 35. After several drinks,

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See generally *Malloy* v. *Hogan*, 378 U. S. 1, 7–8 (1964); *Rogers* v. *Richmond*, 365 U. S. 534, 540–541 (1961); *Bram* v. *United States*, 168 U. S. 532, 543–545 (1897).

[2] I agree with the majority that, in considering "the type of circumstances" that give rise to constitutional rights in this area, the relationship between an attorney and suspect has "a federal definition." *Ante*, at 429, n. 3. In my view, for federal constitutional purposes, members of a suspect's family may provide a lawyer with authority to act on a suspect's behalf while the suspect is in custody.

Burbine told them, a ride home turned into a violent encounter; he hit Hickey several times and threw her out of the car. Three weeks after she was discovered in the parking lot, Hickey died. Three months later, after the 21-hour period of detention by the Cranston and Providence, Rhode Island, police that is the focus of this dispute, Burbine was charged with her murder, and ultimately found guilty of it.

The murder of Mary Jo Hickey was a vicious crime, fully meriting a sense of outrage and a desire to find and prosecute the perpetrator swiftly and effectively. Indeed, by the time Burbine was arrested on an unrelated breaking-and-entering charge, the Hickey murder had been the subject of a local television special.[3] Not surprisingly, Detective Ferranti, the Cranston Detective who "broke" the case, was rewarded with a special commendation for his efforts.[4]

The recognition that ours is an accusatorial, and not an inquisitorial system nevertheless requires that the government's actions, even in responding to this brutal crime, respect those liberties and rights that distinguish this society from most others. As Justice Jackson observed shortly after his return from Nuremberg, cases of this kind present "a real dilemma in a free society . . . for the defendant is shielded by such safeguards as no system of law except the Anglo-American concedes to him."[5] Justice Frankfurter similarly emphasized that it is "a fair summary of history to say that the safeguards of liberty have been forged in controversies involving not very nice people."[6] And, almost a century and a half ago, Macaulay observed that the guilt of Titus Oates could not justify his conviction by improper methods: "That Oates was a bad man is not a sufficient excuse; for the guilty are almost always the first to suffer those hardships which are afterwards used as precedents against the innocent."[7]

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[3] Tr. of Suppression Hearing 167 (S. H.).

[4] *Id.*, at 168.

[5] "Amid much that is irrelevant or trivial, one serious situation seems to me to stand out in these cases. The suspect neither had nor was advised of his right to get counsel. This presents a real dilemma in a free society. To subject one without counsel to questioning which may and is intended to convict him is a real peril to individual freedom. To bring in a lawyer means a real peril to solution of the crime, because, under our adversary system, he deems that his sole duty is to protect his client—guilty or innocent—and that in such a capacity he owes no duty whatever to help society solve its crime problem. Under this conception of criminal procedure, any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.

The Court's holding focuses on the period after a suspect has been taken into custody and before he has been charged with an offense. The core of the Court's holding is that police interference with an attorney's access to her client during that period is not unconstitutional. The Court reasons that a State has a compelling interest, not simply in custodial interrogation, but in lawyer-free, incommunicado custodial interrogation. Such incommunicado interrogation is so important that a lawyer may be given false information that prevents her presence and representation; it is so important that police may refuse to inform a suspect of his attorney's

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"If the State may arrest on suspicion and interrogate without counsel, there is no denying the fact that it largely negates the benefits of the constitutional guaranty of the right to assistance of counsel. Any lawyer who has ever been called into a case after his client has 'told all' and turned any evidence he has over to the Government, knows how helpless he is to protect his client against the facts thus disclosed.

"I suppose the view one takes will turn on what one thinks should be the right of an accused person against the State. Is it his right to have the judgment on the facts? Or is it his right to have a judgment based on only such evidence as he cannot conceal from the authorities, who cannot compel him to testify in court and also cannot question him before? Our system comes close to the latter by any interpretation, for the defendant is shielded by such safeguards as no system of law except the Anglo-American concedes to him." *Watts* v. *Indiana*, 338 U. S. 49, 59 (1949) (Jackson, J., concurring in result).

[6] *United States* v. *Rabinowitz*, 339 U. S. 56, 69 (1950) (Frankfurter, J., dissenting).

[7] 1 T. Macaulay, The History of England 482 (1968 ed.).

communications and immediate availability.[8] This conclusion flies in the face of this Court's repeated expressions of deep concern about incommunicado questioning.[9] Until

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[8] This kind of police-maintained incommunicado questioning becomes, in the Court's rendition, "an essential part of the investigatory process." *Ante*, at 426. Police interference in communications between a lawyer and her client are justified because "[a]dmissions of guilt . . . are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Ibid.* It is this overriding interest in obtaining self-incriminatory statements in the lawyer-free privacy of the police interrogation room that motivates the Court's willingness to swallow its admitted "distaste for the deliberate misleading of an officer of the court." *Ante*, at 424.

[9] See, *e. g.*, *Tague* v. *Louisiana*, 444 U. S. 469, 470 (1980) *(per curiam)* (State bears "'heavy burden'" in proving validity of waivers given "'during incommunicado interrogation'"); *Beckwith* v. *United States*, 425 U. S. 341, 346 (1976) ("special safeguards" are required for "incommunicado interrogation of individuals in a police-dominated atmosphere"); *Darwin* v. *Connecticut*, 391 U. S. 346, 349 (1968) *(per curiam)* (prolonged "incommunicado" interrogation renders confession involuntary); *Miranda* v. *Arizona*, 384 U. S. 436, 475 (1966) (State has "heavy burden" in proving validity of waiver of rights in "incommunicado interrogation"); *Haynes* v. *Washington*, 373 U. S. 503, 514 (1963) ("incommunicado detention" rendered confession involuntary); *Ashcraft* v. *Tennessee*, 322 U. S. 143, 153, n. 8 (1944) ("'Holding incommunicado is objectionable because arbitrary—at the mere will and unregulated pleasure of a police officer'"); *Ward* v. *Texas*, 316 U. S. 547, 555 (1942) ("This Court has set aside convictions based upon confessions extorted from ignorant persons . . . who have been unlawfully held incommunicado without advice of friends or counsel"); *Lisenba* v. *California*, 314 U. S. 219, 240 (1941) ("[W]here a prisoner, held incommunicado, is subjected to questioning by officers for long periods, and deprived of the advice of counsel, we shall scrutinize the record with care to determine whether, by the use of his confession, he is deprived of liberty or life through tyrannical or oppressive means"); *Wan* v. *United States*, 266 U. S. 1, 11 (1924) (holding of suspect "incommunicado" contributes to suppression of confession).

To be sure, in many of these cases, the evidence showed that the suspect had requested, and was denied access to, a lawyer. Until today, however, the Court has never viewed "incommunicado" as applying only to the denial of the suspect's efforts to reach the attorney, and not to the attorney's efforts to reach the suspect. See, *e. g.*, *Darwin* v. *Connecticut*, 391 U. S., today, incommunicado questioning has been viewed with the strictest scrutiny by this Court; today, incommunicado questioning is embraced as a societal goal of the highest order that justifies police deception of the shabbiest kind.

It is not only the Court's ultimate conclusion that is deeply disturbing; it is also its manner of reaching that conclusion. The Court completely rejects an entire body of law on the subject—the many carefully reasoned state decisions that have come to precisely the opposite conclusion.[10] The Court

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at 349 *(per curiam)* (referring *both* to fact that "petitioner's lawyers made numerous attempts to communicate with petitioner or with the officer in charge" and to fact that "petitioner on three separate occasions sought and was denied permission to communicate with the outside world" in reaching the "inescapable" conclusion that "the officers kept petitioner incommunicado"). It is also true that many of these cases involved incommunicado interrogations for very long periods of time; not one of those cases suggested that incommunicado interrogation for shorter periods, maintained by misinforming attorney and client of each other's actions, was supported by a compelling societal interest that justified police deception and misinformation about attorney communications.

[10] The American Bar Association has summarized the relevant cases:

"In all but the last two of the following cases, the Court excluded the statement(s) obtained. *Elfadl* v. *Maryland*, 61 Md. App. 132, 485 A. 2d 275, *cert. denied*, 303 Md. 42, 491 A. 2d 1197, *petition for cert. filed*, 54 U. S. L. W. 3019 (U. S. June 21, 1985) (No. 85–24) (lawyer retained by defendant's wife refused permission to communicate with defendant or have him informed of counsel's presence); *Lodowski* v. *Maryland*, 302 Md. 691, 490 A. 2d 1228 (1985), *petition for cert. filed*, 54 U. S. L. W. 3019 (U. S. June 21, 1985) (No. 85–23) (police prevented communication between lawyer and defendant and did not tell defendant that lawyer was present); *Dunn* v. *State*, No. 248–84 (Tex. June 26, 1985), summarized, 37 Crim. L. Rep. (BNA) 2274 (July 17, 1985) (suspect not told that his wife had retained an attorney who was close at hand); *Lewis* v. *State*, 695 P. 2d 528 (Okla. 1984) (lawyer hired by defendant's parents misdirected by sheriff throughout jail and courthouse while defendant, unaware that parents had retained attorney, was being interrogated in another part of the building); *Commonwealth* v. *Sherman*, 389 Mass. 287, 450 N. E. 2d 566 (1983) (police failed to honor lawyer's request to be present during interrogation and failed to inform suspect of the request); *Weber* v. *State*, 457 A. 2d 674 (Del. 1983) (defendant's father and attorney hired by the father refused similarly dismisses the fact that the police deception which it sanctions quite clearly violates the American Bar Association's Standards for Criminal Justice[11]—Standards which

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access to defendant; police failed to inform defendant of lawyer's presence); *People* v. *Smith*, 93 Ill. 2d 179, 442 N. E. 2d 1325 (1982) (associate of defendant's retained lawyer denied access to client based on fabricated claim that defendant was undergoing drug withdrawal and would not be interrogated in the near future; individual never told of lawyer's attempt to see him although he was given card lawyer left for him); *State* v. *Matthews*, 408 So. 2d 1274 (La. 1982) (attorney's request to speak with defendant refused and instruction to cease interrogation ignored); *State* v. *Haynes*, 288 Or. 59, 602 P. 2d 272 (1979), *cert. denied*, 446 U. S. 945 (1980) (lawyer retained by defendant's wife was told where defendant was being held but the police moved him before lawyer could offer counsel and defendant never told of lawyer's request to offer counsel); *State* v. *Jones*, 19 Wash. App. 850, [5]78 P. 2d 71 (1978) (defendant not informed that counsel had been retained for him or that attorney had instructed client not to speak); *Commonwealth* v. *Hilliard*, 471 Pa. 318, 370 A. 2d 322 (1977) (lawyer first misinformed that defendant was not in custody and later denied access to defendant until he confessed; defendant was not told of lawyer's presence until he confessed); *State* v. *Jackson*, 303 So. 2d 734 (La. 1974) (lawyer retained by defendant's family denied permission to see defendant who was not told of the lawyer's presence); *Commonwealth* v. *McKenna*, 355 Mass. 313, 244 N. E. 2d 560 (1969) (lawyer retained by suspect's mother asked to see client; police misinformed lawyer of suspect's whereabouts and did not indicate that he was already being interrogated); *Blanks* v. *State*, [254 Ga. 420], 330 S. E. 2d 575 (1985) (police finished taking confession before advising defendant that a lawyer was present who wished to see him); *State* v. *Beck*, 687 S. W. 2d 155 (Mo. 1985) (en banc) (lawyer obtained by defendant's mother at defendant's direction given before he was in custody; lawyer called the police and asked to be notified when defendant was arrested but at prosecutor's suggestion police did not so notify lawyer when defendant was arrested in Florida, nor did they advise defendant of lawyer's request)." Brief for American Bar Association as *Amicus Curiae* 4, n. 2.

Since the filing of the ABA brief, still another State Supreme Court has expressed this prevailing view that statements obtained through police interference in communications between an attorney and a suspect must be suppressed. See *Haliburton* v. *Florida*, 476 So. 2d 192 (Fla. 1985) (police continued questioning suspect without telling him that an attorney retained by his sister was at the police station seeking to speak with him).

[11] See ABA Standards for Criminal Justice 5-5.1 (2d ed. 1980) ("Counsel should be provided to the accused as soon as feasible after custody be-

THE CHIEF JUSTICE has described as "the single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history,"[12] and which this Court frequently finds helpful.[13] And, of course, the Court dismisses the fact that the American Bar Association has emphatically endorsed the prevailing state-court position and expressed its serious concern about the effect that a contrary view—a view, such as the Court's, that exalts incommunicado interrogation, sanctions police deception, and demeans the right to consult with an attorney—will have in police stations and courtrooms throughout this Nation.[14] Of greatest importance, the Court misapprehends or rejects the central principles that have, for several decades, animated this Court's decisions concerning incommunicado interrogation.[15]

Police interference with communications between an attorney and his client is a recurrent problem. The factual variations in the many state-court opinions condemning this interference as a violation of the Federal Constitution suggest the

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gins"); ABA Standards for Criminal Justice 5-7.1 (2d ed. 1980) ("At the earliest opportunity, a person in custody should be effectively placed in communication with a lawyer").

[12] Burger, Introduction: The ABA Standards for Criminal Justice, 12 Am. Crim. L. Rev. 251 (1974). See also *id.*, at 253 ("Everyone connected with criminal justice should become totally familiar with the substantive content of the Standards. . . . [T]he Justices of the Supreme Court and hundreds of other judges . . . consult the Standards and make use of them whenever they are relevant").

[13] See, *e. g.*, *Caldwell* v. *Mississippi*, 472 U. S. 320, 334, n. 6 (1985); *Holloway* v. *Arkansas*, 435 U. S. 475, 480, n. 4 (1978); *Dickey* v. *Florida*, 398 U. S. 30, 37-38, nn. 7 and 8 (1970). Cf. *Nix* v. *Whiteside*, *ante*, at 167-168 (emphasizing ABA Model Code and Model Rules in Sixth Amendment analysis).

[14] See Brief for American Bar Association as *Amicus Curiae* 4 ("The ABA is deeply concerned that, if the police may constitutionally prevent any communication between a lawyer and an individual held in isolation, an important right to legal representation will be lost. . . . Many cases decided across the country demonstrate that there is cause for concern as to such police tactics").

[15] See n. 9, *supra*.

variety of contexts in which the problem emerges. In Oklahoma, police led a lawyer to several different locations while they interrogated the suspect;[16] in Oregon, police moved a suspect to a new location when they learned that his lawyer was on his way;[17] in Illinois, authorities failed to tell a suspect that his lawyer had arrived at the jail and asked to see him;[18] in Massachusetts, police did not tell suspects that their lawyers were at or near the police station.[19] In all these cases, the police not only failed to inform the suspect, but also misled the attorneys. The scenarios vary, but the core problem of police interference remains. "Its recurrence suggests that it has roots in some condition fundamental and general to our criminal system." *Watts* v. *Indiana*, 338 U. S. 49, 57 (1949) (Jackson, J., concurring in result).

The near-consensus of state courts and the legal profession's Standards about this recurrent problem lends powerful support to the conclusion that police may not interfere with communications between an attorney and the client whom they are questioning. Indeed, at least two opinions from this Court seemed to express precisely that view.[20] The Court today flatly rejects that widely held view and responds to this recurrent problem by adopting the most restrictive interpretation of the federal constitutional restraints on police deception, misinformation, and interference in attorney-client communications.

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[16] *Lewis* v. *State*, 695 P. 2d 528 (Okla. Crim. App. 1984).

[17] *State* v. *Haynes*, 288 Ore. 59, 602 P. 2d 272 (1979), cert. denied, 446 U. S. 945 (1980).

[18] *People* v. *Smith*, 93 Ill. 2d 179, 442 N. E. 2d 1325 (1982).

[19] *Commonwealth* v. *McKenna*, 355 Mass. 313, 244 N. E. 2d 560 (1969).

[20] See *Miranda* v. *Arizona*, 384 U. S., at 465, n. 35 (In *Escobedo*, "[t]he police also prevented the attorney from consulting with his client. Independent of any other constitutional proscription, this action constitutes a violation of the Sixth Amendment right to the assistance of counsel and excludes any statement obtained in its wake"); *Escobedo* v. *Illinois*, 378 U. S. 478, 487 (1964) ("[I]t 'would be highly incongruous if our system of justice permitted the district attorney, the lawyer representing the State, to extract a confession from the accused while his own lawyer, seeking to speak with him, was kept from him by the police'"), quoting *People* v. *Donovan*, 13 N. Y. 2d 148, 152, 193 N. E. 2d 628, 629 (1963).

The exact reach of the Court's opinion is not entirely clear because, on the one hand, it indicates that more egregious forms of police deception might violate the Constitution, *ante*, at 432, while, on the other hand, it endeavors to make its disposition of this case palatable by making findings of fact concerning the voluntariness of Burbine's confessions that the trial judge who heard the evidence declined to make.[21] Before addressing the legal issues, it therefore seems appropriate to make certain additional comments about what the record discloses concerning the incriminating statements made by Burbine during the 21-hour period that he was detained by the Cranston and Providence police on June 29 and June 30, 1977.

I

As the majority points out, with respect to attorney Munson's telephone call, the Rhode Island Supreme Court's summary of factual findings provides the common ground for analysis:

> "At approximately 8:15 [on June 29, 1977], Ms. Munson called the Cranston police station and asked that her call be transferred to the detective division. A male voice responded with the word 'Detectives.' Ms. Munson identified herself and asked if Brian Burbine was being held; the person responded affirmatively. Ms. Munson explained to the person that Burbine was represented by attorney Casparian who was not available; she further stated that she would act as Burbine's legal counsel in the event that the police intended to place him in a lineup or question him. The unidentified person told Ms. Munson that the police would not be questioning Burbine or putting him in a lineup and that they were

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[21] See *infra*, at 447–448; n. 25, *infra*.

> through with him for the night. Ms. Munson was not informed that the Providence police were at the Cranston police station or that Burbine was a suspect in Mary's murder. The trial justice found as a fact that Ms. Munson did make the call, but further found that there was no collusion or conspiracy on the part of the police 'to secrete [Burbine] from his attorney . . . .'" *State* v. *Burbine*, 451 A. 2d 22, 23–24 (1982).[22]

Although this paragraph accurately describes attorney Munson's 8:15 call, the significance of the false response to her inquiry is best understood in the context of the events that were then proceeding in the police station. The difficulty in reconstructing some of those events illustrates the need for strict presumptions regarding the consequences of custodial interrogation—a need this Court has repeatedly recognized.[23]

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[22] The Court of Appeals, see 753 F. 2d 178, 185 (CA1 1985), and the dissenting opinion of Justice Kelleher of the Rhode Island Supreme Court, see 451 A. 2d, at 38–39, were concerned by the apparent inconsistency between the finding that there was no conspiracy to "secrete" Burbine, and the unequivocal finding that attorney Munson's call had been made. I see no inconsistency, however, because the officer who gave the false information to attorney Munson acknowledged that Burbine was at the station—he did not "secrete" him. The state court's finding that the call was answered by "Detectives" is especially significant in light of Lieutenant Ricard's undisputed testimony that, at the time in question, only he or Detective Ferranti would have answered a call to the detectives division. S. H. 142. Thus, the state-court finding, and the evidence in the record on which it was based, make it perfectly clear that either Ricard or Ferranti must have known of the call. Both categorically denied any such knowledge in their testimony.

[23] See, *e. g.*, *Edwards* v. *Arizona*, 451 U. S. 477 (1981); *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Cf. *Oregon* v. *Bradshaw*, 462 U. S. 1039, 1044 (1983) (plurality opinion of REHNQUIST, J.) (*Edwards* articulated "a prophylactic rule, designed to protect an accused in police custody from being badgered by police officers in the manner in which the defendant in *Edwards* was").

On June 27, 1977, an unidentified person advised Detective Ferranti that a man known as "Butch," who lived at 306 New York Avenue in Providence, was responsible for the death of Mary Jo Hickey. The record does not explain why Ferranti, who was a member of the Cranston Police Force, was informed about a crime that occurred in Providence.

At about 3 p.m. on June 29, 1977, Cranston police officers apprehended respondent Burbine and two other men (DiOrio and Sparks) in "a burned out building in the Cranston area." S. H. 6, 180. The three men were taken to the Cranston police station, charged with "breaking and entering," and placed in separate rooms. After noticing that DiOrio and Burbine lived at 306 New York Avenue in Providence, Detective Ferranti talked to DiOrio and was told that Burbine was the only "Butch" at that address. *Id.*, at 146-147.

At approximately 4:30, Ferranti "went in the room where Burbine was" and asked him "if there was anybody that he knew by the name of Butch on the street, and he said he was the only Butch." *Id.*, at 148.[24] After the brief questioning about the identity of "Butch," Detective Ferranti left Burbine in the interrogation room—where he remained until about 9 p.m.[25]—and interrogated DiOrio and Sparks. They both "made damaging statements relative to Burbine being involved in the murder in Providence"; Ferranti therefore "immediately contacted Providence Police." *Id.*, at 149-150. The Providence officers—Captain Wilson (the Chief of Detectives), Lieutenant Gannon, and Detective Trafford—responded promptly, and arrived at the Cranston station between 6 and 7 p.m. Lieutenant Gannon testified that, as he drove to the Cranston police station, he knew that he might not be able to question Burbine "[i]f for some reason he didn't want to give me a statement, if for some reason he chose to get an attorney and the attorney informed us that he didn't want him to give a statement." Trial Tr. 407.

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[24] In his police report completed the night of June 29, Detective Ferranti stated, in contrast to his testimony, that he questioned Burbine before questioning DiOrio. Defendant Ex. D.

[25] The Court makes its own findings about Burbine's access to a telephone during this period. *Ante*, at 418. No state court made such a finding, and the record contains no evidence indicating whether Burbine was told he could use the phone, whether an outside line was available without use of the police switchboard, or any number of other possibly relevant factors.

After arriving at the station, the three Providence officers, as well as Ferranti and a second Cranston officer (Lieutenant Ricard), either remained in the large central room in the basement of the Cranston police station, or participated in the questioning of DiOrio and Sparks in interrogation rooms adjacent to that large central room.

It was at this point—with Burbine alone in another adjacent room, with Providence police on hand, with police from two Departments questioning Sparks and DiOrio about Burbine's involvement in the Hickey homicide—that attorney Munson telephoned. Her call arrived at 8:15; she asked for "Detectives," and was told that the police "would not be questioning Burbine" and that they were "through" with him for the night. These statements were false. Moreover, she was not told that Burbine would be questioned about a homicide rather than the breaking-and-entering charge on which he had been arrested, and she was not told that Providence police were at the Cranston police station preparing to question Burbine about a Providence crime.

At about 9, some 45 minutes after Munson received the assurance that the police were "through" with Burbine, the officers completed their questioning of DiOrio and Sparks and were prepared to question Burbine. There is no dispute about the fact that Burbine was brought into the central room at about 9, that all five police officers were then present, and that Burbine appeared somewhat upset and professed that he "'didn't do anything wrong.'" S. H. 21. Detective Ferranti testified that this statement was in response to questions from the Providence police about the Hickey homicide;[26] Lieutenant Gannon of the Providence police testified that the statement was about the Hickey homicide, but that Providence police did not question Burbine and that they merely saw Burbine being escorted by Ferranti.[27] Burbine was not told that attorney Munson had called and had asked about him; nor was he told that Munson had been informed that the police were through with him for the night. After his protestations, Burbine was taken into another interrogation room.

Detective Ferranti then went into that room and, according to the testimony of the Providence officers, spent either "ten minutes" or from "five to ten minutes" alone with Burbine.[28] The record does not tell us whether he told Burbine that Sparks and DiOrio had just given statements implicating him in the Hickey homicide. Nor does it resolve the question whether Burbine's decision to confess was made *before* his session with Ferranti or *as a result* of that session. The Court evidently makes the former assumption, for it asserts that Burbine "initiated" this encounter. *Ante*, at 421–422. However, the state courts made no finding about this

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[26] See Testimony of Detective Ferranti, S. H. 152 (Providence police "started to question him relative to the murder in Providence"). See also Defendant Ex. D (Detective Ferranti's contemporaneous account) (Burbine "was confronted with this murder by Lt. Gan[n]on and other members of the PPD Det. Div. Lt. Ricard and myself. He flatly denied being involved or having any knowledge of this murder, although he did state that he had been in the bar with this girl and that he knew her from his mother who was friendly with her in the past").

[27] See, *e. g.*, Testimony of Lieutenant Gannon, S. H. 21 (agreeing with questioner's statement that "none of these police officers said anything to Brian Burbine before he said those things"). Cf. Testimony of Detective Trafford, *id.*, at 79 (Burbine "passed through the detective division and he was brought to, I believe, one of their interview rooms. . . . He was muttering something. I really don't know what he was saying").

[28] See *id.*, at 22, 57. Detective Ferranti testified that he was alone with Burbine for "a couple of minutes." *Id.*, at 174. He also testified that he went into the room, that Burbine told him to summon the Providence police, and that he complied "immediately." *Id.*, at 155.

"initiation" by Burbine. Detective Ferranti testified that Burbine banged and kicked on the door, S. H. 153–154; Lieutenant Gannon testified that he "believed" there was a knocking or some communication from Burbine, *id.*, at 22, but he was "not sure." *Id.*, at 66.[29] None of the other officers, who were apparently in the large room adjacent to Burbine's, corroborated this testimony by mentioning any "banging," "kicking," or other noise from Burbine's direction. In all events, some minutes later, Detective Ferranti came back out of the room and indicated that Burbine wanted to talk.

Lieutenant Gannon and Detective Trafford of the Providence police accompanied Detective Ferranti "back into the room." During the period between 9:30 and 10:20 p.m., they administered *Miranda* warnings and typed out a four-page statement which Burbine signed, waiving his constitutional rights, acknowledging his responsibility for the death of Hickey, and reciting his version of that event. Ferranti alternately testified that Burbine was "coherent" and "incoherent" at the time of this questioning. *Id.*, at 157–158; Trial Tr. 198, 208–209. Apparently for the first time since his arrival at the station in the afternoon, the police then brought Burbine some food. S. H. 160, Trial Tr. 205.

After obtaining Burbine's signature on the first written statement at 10:20 p.m., the police were still not "through" with Burbine. Burbine's first statement included no mention of the clothes that he had been wearing, or of a glass that was found with Hickey's purse a few blocks from the homicide. Soon after the completion of the first statement, and after the Providence and Cranston officers had discussed the first statement and expressed pleasure with their success,[30]

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[29] See Testimony of Lieutenant Gannon, *id.*, at 63 ("I don't know if he knocked on the door. I'm not sure how we were re-summoned back into the room").

[30] See Testimony of Lieutenant Gannon, *id.*, at 62 (noting that, after first statement, officers discussed it and that "we were all collectively pleased that we did obtain a statement from him"). Major Leyden, a high-ranking

Gannon, Trafford, and Ferranti again questioned Burbine. They ascertained that he was wearing his "red toke" and "black windbreaker" at the time, and that Hickey had left the bar with a glass in hand.[31] At 11:20 p.m., Burbine signed the second statement.

The following morning, the officers obtained a warrant, conducted a search of Burbine's residence, and seized the clothing that he had described in the second statement. In the meantime, Burbine was arraigned in Cranston court on the charge for which he had been arrested. Still without counsel, Burbine pleaded guilty to malicious damage. After the Cranston proceeding, Providence officers instantly arrested him for the Hickey homicide. Trial Tr. 501. Burbine was taken to the Providence police station, where he executed a third waiver of rights and identified the coat and jacket that the officers had seized. Shortly after noon, Major Leyden called the Public Defender's Office and requested counsel for Burbine because he would be placed in a lineup. *Id.*, at 423.

Thus, although there are a number of ambiguities in the record, the state-court findings established (1) that attorney Munson made her call at about 8:15 p.m.; (2) that she was given false information; (3) that Burbine was not told of her

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Providence officer, had been told about the break in the case, and he arrived at the Cranston station toward the end of Burbine's statement.

[31] According to Lieutenant Gannon, "in the second statement the questions about the glass and the clothes were Captain Wilson's ideas." Trial Tr. 387. The state courts made no finding about the initiation of the conversation leading to the second statement. According to the signed statement, Lieutenant Gannon stated that Burbine "remembered something concerning a glass," App. to Pet. for Cert. 105, and Burbine did not contest that account. Detective Ferranti testified that Providence police told him Burbine initiated the conversation. Trial Tr. 252. In contrast, Providence Detective Trafford testified that he was "not sure" how they concluded Burbine wished to speak again, but he "believe[d] Detective Ferranti notified us." *Id.*, at 443. Lieutenant Gannon testified that he "believe[d]" Burbine "indicated by knocking on the door." *Id.*, at 409.

call; and (4) that he was thereafter given the *Miranda* warnings, waived his rights, and signed three incriminating statements without receiving any advice from an attorney. The remainder of the record underscores two points. The first is the context of the call—a context in which two Police Departments were on the verge of resolving a highly publicized, hauntingly brutal homicide and in which, as Lieutenant Gannon testified, the police were aware that counsel's advice to remain silent might be an obstacle to obtaining a confession. The second is the extent of the uncertainty about the events that motivated Burbine's decision to waive his rights. The lawyer-free privacy of the interrogation room, so exalted by the majority, provides great difficulties in determining what actually transpired. It is not simply the ambiguity that is troublesome; if so, the problem would be not unlike other difficult evidentiary problems. Rather, the particularly troublesome aspect is that the ambiguity arises in the very situation—incommunicado interrogation—for which this Court has developed strict presumptions and for which this Court has, in the past, imposed the heaviest burden of justification on the goverment. It is in this context, and the larger context of our accusatorial system, that the deceptive conduct of the police must be evaluated.

II

Well-settled principles of law lead inexorably to the conclusion that the failure to inform Burbine of the call from his attorney makes the subsequent waiver of his constitutional rights invalid. Analysis should begin with an acknowledgment that the burden of proving the validity of a waiver of constitutional rights is always on the *government*.[32] When such a waiver occurs in a custodial setting, that burden is an especially heavy one because custodial interrogation is inherently coercive,[33] because disinterested witnesses are seldom available to describe what actually happened,[34] and because history has taught us that the danger of overreaching during incommunicado interrogation is so real.[35]

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[32] See, *e. g., Brewer* v. *Williams*, 430 U. S. 387, 404 (1977) ("[C]ourts indulge in every reasonable presumption against waiver"); *Miranda* v. *Arizona*, 384 U. S., at 475 ("If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or

In applying this heavy presumption against the validity of waivers, this Court has sometimes relied on a case-by-case totality of the circumstances analysis.[36] We have found, however, that some custodial interrogation situations require strict presumptions against the validity of a waiver. *Miranda* established that a waiver is not valid in the absence of certain warnings. *Edwards* v. *Arizona*, 451 U. S. 477 (1981), similarly established that a waiver is not valid if police

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appointed counsel. . . . Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders"); *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938) ("'[C]ourts indulge every reasonable presumption against waiver' of fundamental constitutional rights and . . . we 'do not presume acquiescence in the loss of fundamental rights'") (footnotes omitted).

[33] See *Miranda*, 384 U. S., at 455 ("[T]he very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals").

[34] There is a natural tendency to discredit the testimony of the suspect because of his obvious interest, but it is also true that there have been cases in which the desire to insure a conviction of an apparently guilty suspect has led police officers to color their testimony. As Judge Wilkey observed in a different context, a police officer may "feel that he has a 'higher duty' than the truth. He may perjure himself to convict the defendant." Wilkey, The Exclusionary Rule, 62 Judicature 215, 226 (1978).

[35] See *United States* v. *Carignan*, 342 U. S. 36, 46 (1951) (Douglas, J., concurring) ("What happens behind doors that are opened and closed at the sole discretion of the police is a black chapter in every country—the free as well as the despotic, the modern as well as the ancient").

[36] See, *e. g.*, *Fare* v. *Michael C.*, 442 U. S. 707, 724–725 (1979); *North Carolina* v. *Butler*, 441 U. S. 369, 374–375 (1979); *Faretta* v. *California*, 422 U. S. 806, 835 (1975).

initiate questioning after the defendant has invoked his right to counsel. In these circumstances, the waiver is invalid as a matter of law even if the evidence overwhelmingly establishes, as a matter of fact, that "a suspect's decision not to rely on his rights was uncoerced, that he at all times knew that he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction," see *ante*, at 422. In light of our decision in *Edwards*, the Court is simply wrong in stating that "the analysis is complete and the waiver is valid as a matter of law" when these facts have been established. *Ante*, at 422–423.[37] Like the failure to give warnings and like police initiation of interrogation after a request for counsel, police deception of a suspect through omission of information regarding attorney communications greatly exacerbates the inherent problems of incommunicado interrogation and requires a clear principle to safeguard the presumption against the waiver of constitutional rights. As in those situations, the police deception should render a subsequent waiver invalid.

Indeed, as *Miranda* itself makes clear, proof that the required warnings have been given is a necessary, but by no means sufficient, condition for establishing a valid waiver. As the Court plainly stated in *Miranda*, "any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege. The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth

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[37] See also *Solem* v. *Stumes*, 465 U. S. 638, 641, 647–648 (1984) (Under *Edwards*, "once a suspect has invoked the right to counsel, any subsequent conversation must be initiated by him. . . . It does not in any way cast doubt on the legitimacy or necessity of *Edwards* to acknowledge that in some cases, a waiver could be knowing, voluntary, and intelligent even though it occurred when the police recommenced questioning after an accused had invoked the right to counsel").

Amendment privilege and not simply a preliminary ritual to existing methods of interrogation." 384 U. S., at 476.

In this case it would be perfectly clear that Burbine's waiver was invalid if, for example, Detective Ferranti had "threatened, tricked, or cajoled" Burbine in their private preconfession meeting—perhaps by misdescribing the statements obtained from DiOrio and Sparks—even though, under the Court's truncated analysis of the issue, Burbine fully understood his rights. For *Miranda* clearly condemns threats or trickery that cause a suspect to make an unwise waiver of his rights even though he fully understands those rights. In my opinion there can be no constitutional distinction—as the Court appears to draw, *ante*, at 423–424—between a deceptive misstatement and the concealment by the police of the critical fact that an attorney retained by the accused or his family has offered assistance, either by telephone or in person.[38]

Thus, the Court's truncated analysis, which relies in part on a distinction between deception accomplished by means of an omission of a critically important fact and deception by means of a misleading statement, is simply untenable. If, as the Court asserts, "the analysis is at an end" as soon as the suspect is provided with enough information to have the *capacity* to understand and exercise his rights, I see no reason why the police should not be permitted to make the same kind of misstatements to the suspect that they are apparently allowed to make to his lawyer. *Miranda*, however, clearly establishes that both kinds of deception vitiate the suspect's waiver of his right to counsel.[39]

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[38] The Court cites *Johnson* v. *Zerbst*, 304 U. S. 458 (1938), a case involving a claim that a defendant had waived his right to trial counsel. I find it inconceivable that, in such a situation, an otherwise sufficient series of questions and answers can support a valid waiver if the government misinforms an attorney about the defendant's trial date, and if the government fails to tell the defendant of the attorney's communications. Yet that would be the consequence of the Court's "what the suspect doesn't know can't hurt him" approach to this case.

As the Court notes, the question is whether the deceptive police conduct "deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." *Ante*, at 424. This question has been resoundingly answered time and time again by the state courts that, with rare exceptions,[40] have correctly understood the meaning of the *Miranda* opinion.[41] The majority's blithe assertion of "no doubt" about the outcome of this case, *ante*, at 421, simply ignores the prevailing view of the state courts that have considered this issue. Particularly in an opinion that relies on a desire to avoid "a federal intrusion into the criminal processes of the States," *ante*, at 434, one would expect at least some indication why, in the majority's view, so many state courts have been so profoundly wrong on this precise issue. Unlike the majority, the state courts have realized that attorney communication to the police

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[39] It is thus clear that the majority's comparison of a suspect in Burbine's position with "the same defendant . . . had a lawyer not telephoned the police station," *ante*, at 422, sets up a false comparison. For *Miranda*'s condemnation of trickery and cajolery requires that an assessment of police conduct figure importantly in the assessment of a suspect's decision to waive his fundamental constitutional rights. In the majority's comparison, however, the police conduct is irrelevant. In contrast, the appropriate comparison is between a suspect in Burbine's position and a suspect who is otherwise tricked and deceived into a waiver of his rights. *Miranda* itself, as well as the long-established presumption against the waiver of constitutional rights, requires that both kinds of waiver be held invalid.

[40] See n. 10, *supra*. Aside from this case, the only two exceptions were decided in 1985. Those recent cases may reflect a recognition that this Court is increasingly less than faithful to *Miranda*'s clear teachings. See, *e. g., New York* v. *Quarles*, 467 U. S. 649 (1984); *Oregon* v. *Elstad*, 470 U. S. 298 (1985). Cf. *New York* v. *Quarles*, 467 U. S., at 660 (O'CONNOR, J., dissenting in part) ("*Miranda* is now the law and, in my view, the Court has not provided sufficient justification for departing from it or for blurring its now clear strictures").

[41] See *Lodowski* v. *State*, 302 Md. 691, 721, 490 A. 2d 1228, 1243 (1985) ("We have stated our view that a suspect must be fully informed of the actual presence and availability of counsel who seeks to confer with him, in order that any waiver of a right to counsel, as established by *Miranda*, can be knowing and intelligent"); *Haliburton* v. *Florida*, 476 So. 2d, at 194 ("In order for the right to counsel to be meaningful, a defendant must be told when an attorney who has been retained on his behalf is trying to advise him"); *Lewis* v. *State*, 695 P. 2d, at 529 ("The dispositive issue on this appeal is . . . whether a defendant's waiver of his rights to counsel and against self-incrimination is knowingly and intelligently made when the defendant is not informed of his attorney's availability at police headquarters. We hold today that such a waiver is constitutionally invalid"); *Common-*

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wealth v. *Sherman*, 389 Mass. 287, 296, 450 N. E. 2d 566, 571 (1983) ("[W]e conclude that the statement of the defendant must be suppressed because, under principles of construction of Miranda, the failure of the police to inform the defendant of the attorney's request [to see him] vitiated the defendant's waiver of his Miranda rights"); *Weber* v. *State*, 457 A. 2d 674, 685 (Del. 1983) ("When a suspect does not know that an attorney, who has been retained or properly designated to represent him, is actually present in the police station seeking an opportunity to render legal assistance, and the police do not inform him of that fact, there can be no intelligent and knowing waiver"); *People* v. *Smith*, 93 Ill. 2d, at 189, 442 N. E. 2d, at 1329 ("We hold that when police, prior to or during custodial interrogation, refuse an attorney appointed or retained to assist a suspect access to the suspect, there can be no knowing waiver of the right to counsel if the suspect has not been informed that the attorney was present and seeking to consult with him"); *State* v. *Haynes*, 288 Ore., at 70, 602 P. 2d, at 277 ("We hold only that when unknown to the person in this situation an identified attorney is actually available and seeking an opportunity to consult with him, and the police do not inform him of that fact, any statement or the fruits of any statement obtained after the police themselves know of the attorney's efforts to reach the arrested person cannot be rendered admissible on the theory that the person knowingly and intelligently waived counsel").

As noted, two state courts besides the Rhode Island Supreme Court have reached a contrary conclusion. See *State* v. *Beck*, 687 S. W. 2d 155, 159 (Mo. 1985) ("In light of the careful attention the deputies gave to insuring that defendant was properly informed of his *Miranda* rights, his unequivocal responses and determined conduct, evince nothing less than a deliberate, firm, knowing, and intelligent choice to speak without the prior counsel of Ms. Hendrix or any other attorney"); *Blanks* v. *State*, 254 Ga. 420, 423, 330 S. E. 2d 575, 579 (1985) ("In this case, Blanks was advised of his right to legal assistance on numerous occasions. The record shows overwhelmingly that he knowingly, intelligently, and voluntarily waived this right and spoke willingly to law enforcement officers").

about the client is an event that has a direct "bearing" on the knowing and intelligent waiver of constitutional rights. As the Oregon Supreme Court has explained: "To pass up an abstract offer to call some unknown lawyer is very different from refusing to talk with an identified attorney actually available to provide at least initial assistance and advice, whatever might be arranged in the long run. A suspect indifferent to the first offer may well react quite differently to the second." *State* v. *Haynes*, 288 Ore. 59, 72, 602 P. 2d 272, 278 (1979), cert. denied, 446 U. S. 945 (1980).[42]

In short, settled principles about construing waivers of constitutional rights and about the need for strict presumptions in custodial interrogations, as well as a plain reading of the *Miranda* opinion itself, overwhelmingly support the conclusion reached by almost every state court that has considered the matter—a suspect's waiver of his right to counsel is invalid if police refuse to inform the suspect of his counsel's communications.

III

The Court makes the alternative argument that requiring police to inform a suspect of his attorney's communications to and about him is not required because it would upset the careful "balance" of *Miranda.* Despite its earlier notion that the attorney's call is an "outside event" that has "no bearing" on a knowing and intelligent waiver, the majority does acknowledge that information of attorney Munson's call "would have been useful to respondent" and "might have affected his decision to confess." *Ante,* at 422.[43] Thus, a rule requiring the police to inform a suspect of an attorney's call would have two predictable effects. It would serve "*Miranda*'s goal of dispelling the compulsion inherent in custodial interrogation," *ante,* at 425, and it would disserve the goal of custodial interrogation because it would result in fewer confessions. By a process of balancing these two concerns, the Court finds the benefit to the individual outweighed by the "substantial cost to society's legitimate and substantial interest in securing admissions of guilt." *Ante,* at 427.

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[42] See also *People* v. *Smith*, 93 Ill. 2d, at 187, 442 N. E. 2d, at 1328–1329; *Commonwealth* v. *Sherman*, 389 Mass., at 291, 450 N. E. 2d, at 568.

The majority mischaracterizes this dissent by stating that its "major premise" is that "*Miranda* requires the police to inform a suspect of any and all information that would be useful to a decision whether to remain silent or speak with the police." *Ante*, at 433, n. 4. The majority's response ignores the fact that the police action here is not simply a failure to provide "useful" information; rather, it is affirmative police interference in a communication between an attorney and a suspect. Moreover, the "information" intercepted by the police bears directly on the right to counsel that police are asking the suspect to waive. The "information" at issue is thus far different from information about "the nature and quality of the evidence," *Oregon* v. *Elstad*, 470 U. S., at 317, or about a grand jury witness' possible target status, *United States* v. *Washington*, 431 U. S. 181, 188–189 (1977).

The Court's balancing approach is profoundly misguided. The cost of suppressing evidence of guilt will always make the value of a procedural safeguard appear "minimal," "marginal," or "incremental." Indeed, the value of any trial at all seems like a "procedural technicality" when balanced against the interest in administering prompt justice to a murderer or a rapist caught redhanded. The individual interest in procedural safeguards that minimize the risk of error is easily discounted when the fact of guilt appears certain beyond doubt.

What is the cost of requiring the police to inform a suspect of his attorney's call? It would decrease the likelihood that custodial interrogation will enable the police to obtain a confession. This is certainly a real cost, but it is the same cost that this Court has repeatedly found necessary to preserve the character of our free society and our rejection of an inquisitorial system. Three examples illustrate the point.

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[43] In contrast, the theory of the Rhode Island Supreme Court's decision was that, as a matter of fact, knowledge of attorney Munson's call would not have affected Burbine's decision to confess. *State* v. *Burbine,* 451 A. 2d 22, 29 (1982).

In *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), we excluded a confession by a defendant who had not been permitted to consult with his lawyer, and whose lawyer had not been permitted to see him. We emphasized the "lesson of history" that our system of justice is not founded on a fear that a suspect will exercise his rights. "If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system." *Id.*, at 490. In *Miranda* v. *Arizona*, 384 U. S. 436 (1966), we similarly stressed this character of our system, despite its "cost," by unequivocally holding that an individual has an absolute right to refuse to respond to police interrogation and to have the assistance of counsel during any questioning.[44] Thus, as a matter of law, the assumed right of the police to interrogate a suspect is no right at all; at best, it is a mere privilege terminable at the will of the suspect. And, more recently in *Dunaway* v. *New York*, 442 U. S. 200 (1979), the Court corrected the long-held but mistaken view of the police that they have some sort of right to take any suspect into custody for the purpose of questioning him even though they may not have probable cause to arrest.[45]

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[44] After endorsing the statement by "one of our country's distinguished jurists" that the quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law, the Court wrote:

"If the individual desires to exercise his privilege, he has the right to do so. This is not for the authorities to decide. An attorney may advise his client not to talk to police until he has had an opportunity to investigate the case, or he may wish to be present with his client during any police questioning. In doing so, an attorney is merely exercising the good professional judgment he has been taught. This is not cause for considering the attorney a menace to law enforcement. He is merely carrying out what he is sworn to do under his oath—to protect to the extent of his ability the rights of his client. In fulfilling this responsibility the attorney plays a vital role in the administration of criminal justice under our Constitution." *Miranda* v. *Arizona*, 384 U. S., at 480–481.

Just as the "cost" does not justify taking a suspect into custody or interrogating him without giving him warnings simply because police desire to question him, so too the "cost" does not justify permitting police to withhold from a suspect knowledge of an attorney's communication, even though that communication would have an unquestionable effect on the suspect's exercise of his rights. The "cost" that concerns the Court amounts to nothing more than an acknowledgment that the law enforcement interest in obtaining convictions suffers whenever a suspect exercises the rights that are afforded by our system of criminal justice. In other words, it is the fear that an individual may exercise his rights that tips the scales of justice for the Court today. The principle that ours is an accusatorial, not an inquisitorial, system, however, has repeatedly led the Court to reject that fear as a valid reason for inhibiting the invocation of rights.

If the Court's cost-benefit analysis were sound, it would justify a repudiation of the right to a warning about counsel itself. There is only a difference in degree between a presumption that advice about the immediate availability of a lawyer would not affect the voluntariness of a decision to confess, and a presumption that every citizen knows that he has a right to remain silent and therefore no warnings of any kind are needed. In either case, the withholding of information serves precisely the same law enforcement interests. And in both cases, the cost can be described as nothing more than an incremental increase in the risk that an individual will make an unintelligent waiver of his rights.

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[45] A recent treatise describes the significant effect of *Dunaway:*

"Over the years, the impression generally prevailed that the police could 'pick-up' suspects for questioning. In 1979, however, the Supreme Court of the United States held, in *Dunaway* v. *New York*, that a confession obtained after a 'pick-up' without probable cause (i. e., without reasonable grounds) to make an actual arrest could not be used as evidence." F. Inbau, J. Reid, & J. Buckley, Criminal Interrogation and Confessions 211 (3d ed. 1986).

In cases like *Escobedo*, *Miranda*, and *Dunaway*, the Court has viewed the balance from a much broader perspective. In all these cases—indeed, whenever the distinction between an inquisitorial and an accusatorial system of justice is implicated—the law enforcement interest served by incommunicado interrogation has been weighed against the interest in individual liberty that is threatened by such practices. The balance has never been struck by an evaluation of empirical data of the kind submitted to legislative decisionmakers—indeed, the Court relies on no such data today. Rather, the Court has evaluated the quality of the conflicting rights and interests. In the past, that kind of balancing process has led to the conclusion that the police have *no right* to compel an individual to respond to custodial interrogation, and that the interest in liberty that is threatened by incommunicado interrogation is so precious that special procedures must be followed to protect it. The Court's contrary conclusion today can only be explained by its failure to appreciate the value of the liberty that an accusatorial system seeks to protect.

IV

The Court also argues that a rule requiring the police to inform a suspect of an attorney's efforts to reach him would have an additional cost: it would undermine the "clarity" of the rule of the *Miranda* case. *Ante*, at 425–426. This argument is not supported by any reference to the experience in the States that have adopted such a rule. The Court merely professes concern about its ability to answer three quite simple questions.[46]

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[46] Thus, the Court asks itself:

(1) "To what extent should the police be held accountable for knowing that the accused has counsel?" *Ante*, at 425. The simple answer is that police should be held accountable to the extent that the attorney or the suspect informs the police of the representation.

Moreover, the Court's evaluation of the interest in "clarity" is rather one-sided. For a police officer with a printed card containing the exact text he is supposed to recite, perhaps the rule is clear. But the interest in clarity that the *Miranda* decision was intended to serve is not merely for the benefit of the police. Rather, the decision was also, and primarily, intended to provide adequate guidance to the person in custody who is being asked to waive the protections afforded by the Constitution.[47] Inevitably, the *Miranda* decision also serves the judicial interest in clarifying the inquiry

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(2) "Is it enough that someone in the station house knows, or must the interrogating officer himself know of counsel's efforts to contact the suspect?" *Ibid.* Obviously, police should be held responsible for getting a message of this importance from one officer to another.

(3) "Do counsel's efforts to talk to the suspect concerning one criminal investigation trigger the obligation to inform the defendant before interrogation may proceed on a wholly separate matter?" *Ibid.* As the facts of this case forcefully demonstrate, the answer is "yes."

[47] Two examples will illustrate the one-sided character of the Court's conception of the clarity of the *Miranda* warnings. Although a suspect is told that a lawyer will be appointed if he "cannot afford one," he may have no way of determining whether his resources are adequate to pay an attorney; even Members of this Court cannot agree when a person is too poor to pay his own legal costs. See, *e. g.*, *Pfeil* v. *Rogers*, 474 U. S. 812 (1985) (Court splits 5–4 on whether to grant petitioner leave to proceed *in forma pauperis*); *Barrett* v. *United States Customs Service*, 474 U. S. 812 (1985) (same). Similarly, although a suspect is entitled to rely on the implicit promise that his silence will not be used against him, *Wainwright* v. *Greenfield*, 474 U. S. 284 (1986); *Doyle* v. *Ohio*, 426 U. S. 610 (1976), it is by no means clear that every suspect will understand that promise; many may fear that silence or a request for counsel will be construed as an admission of guilt. Cf. *Griffin* v. *California*, 380 U. S. 609, 610–611 (1965) (prosecutor argued that defendant's silence was probative of his guilt); App. in *Michigan* v. *Jackson*, O. T. 1985, No. 84–1531, pp. 157–158 (police statement to suspect) ("I think you need a brick to hit you against a wall to realize that your in serious trouble here and that the only way that you have any hope is by us. I don't know what your gonna think, how if you want an attorney, I'll tell you what an attorney is gonna tell ya, an attorney is gonna tell ya don't talk to police. . . . But, the attorney doesn't go to jail, does he?").

into what actually transpired during a custodial interrogation.[48] Under the Court's conception of the interest in clarity, however, the police would presumably prevail whenever they could convince the trier of fact that a required ritual was performed before the confession was obtained.

V

At the time attorney Munson made her call to the Cranston police station, she was acting as Burbine's attorney. Under ordinary principles of agency law the deliberate deception of Munson was tantamount to deliberate deception of her client.[49] If an attorney makes a mistake in the course of her representation of her client, the client must accept the consequences of that mistake.[50] It is equally clear that when an attorney makes an inquiry on behalf of her client, the client is entitled to a truthful answer. Surely the client must have the same remedy for a false representation to his lawyer that he would have if he were acting *pro se* and had propounded the question himself.

The majority brushes aside the police deception involved in the misinformation of attorney Munson. It is irrelevant to the Fifth Amendment analysis, concludes the majority, because that right is personal; it is irrelevant to the Sixth

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[48] Indeed, in contrast to the majority's remarks about clarity, the operation of the principle expressed by almost all the state courts would be far clearer than the operation of the Court's contrary principle. For it is surely easier to administer a rule that applies to an external event, such as an attorney's telephone call or a visit to the police station, than a rule that requires an evaluation of the state of mind of a person undergoing custodial interrogation.

[49] In contrast to the Court's opinion today, the Court in the past has had no problems applying principles of agency to the invocation of constitutional rights. See *Brewer* v. *Williams*, 430 U. S., at 405 (the accused "had effectively asserted his right to counsel by having secured attorneys at both ends of the automobile trip, both of whom, *acting as his agents*, had made clear to the police that no interrogation was to occur during the journey") (emphasis added).

[50] See, *e. g.*, *Engle* v. *Isaac*, 456 U. S. 107, 134 (1982).

Amendment analysis, continues the majority, because the Sixth Amendment does not apply until formal adversary proceedings have begun.

In my view, as a matter of law, the police deception of Munson was tantamount to deception of Burbine himself. It constituted a violation of Burbine's right to have an attorney present during the questioning that began shortly thereafter. The existence of that right is undisputed.[51] Whether the source of that right is the Sixth Amendment, the Fifth Amendment, or a combination of the two is of no special importance, for I do not understand the Court to deny the existence of the right.

The pertinent question is whether police deception of the attorney is utterly irrelevant to that right. In my judgment, it blinks at reality to suggest that misinformation which prevented the presence of an attorney has no bearing on the protection and effectuation of the right to counsel in custodial interrogation. The majority parses the role of attorney and suspect so narrowly that the deception of the attorney is of no constitutional significance. In other contexts, however, the Court does not hesitate to recognize an identity between the interest of attorney and accused.[52] The character of the attorney-client relationship requires rejection of the Court's notion that the attorney is some entirely distinct, completely severable entity and that deception of the attorney is irrelevant to the right of counsel in custodial interrogation.[53]

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[51] See *Edwards* v. *Arizona,* 451 U. S., at 482 ("*Miranda* . . . declared that an accused has a Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation"); *Miranda,* 384 U. S. at 479. In his *Miranda* dissent, Justice Harlan correctly noted that the Court had held that a person in custody "has a right to have present an attorney during the questioning, and that if indigent he has a right to a lawyer without charge." *Id.*, at 504. The standard written waiver form used by the police in this case recited: "I have the right to the presence of an attorney prior to and during any questioning by the police."

In his argument for the United States as *amicus curiae*, the Solicitor General advanced the remarkable suggestion that *Miranda*'s requirement that an individual be told that he has a right to consult with counsel while in custody is "a sort of a white lie" that is "harmless" and "useful." Tr. of Oral Arg. 21. He contended that "police do not have to provide a lawyer if he asks for a lawyer. They need simply terminate the interrogation." *Ibid.* I find this view completely untenable, and I take it that the Court's opinion, in today's sanctioning of police deception, does not in any way accept the suggestion that this Court's required warnings are themselves a constitutionally compelled form of deception, or "white lie."

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[52] See, *e. g.*, *Strickland* v. *Washington*, 466 U. S. 668, 690 (1984) (when client challenges effectiveness of assistance, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment"); *Wainwright* v. *Sykes*, 433 U. S. 72, 91, n. 14 (1977) ("[D]ecisions of counsel relating to trial strategy, even when made without the consultation of the defendant, would bar direct federal review of claims thereby forgone, except where 'the circumstances are exceptional'").

[53] Prevailing norms of legal practice prevent a lawyer from communicating with a party, rather than a lawyer. See Disciplinary Rule 7-104(A)(1), ABA Code of Professional Responsibility (1980) ("During the course of his representation of a client a lawyer shall not: Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so"). Cf. *United States* v. *Foley*, 735 F. 2d 45, 48 (CA2 1984) (prosecutorial practice of interviewing defendants in the absence of counsel before arraignment "raises serious constitutional questions" and "contravene[s] the principles of DR7-104(A)(1)), cert. denied *sub nom. Edler* v. *United States*, 469 U. S. 1161 (1985); *State* v. *Yatman*, 320 So. 2d 401, 403 (Fla. App. 1975) ("Disciplinary Rule 7-104 of the Code of Professional Responsibility applies equally to lawyers involved in the prosecution of criminal cases as in civil cases. . . . If any communication with a person represented by counsel on the subject under litigation is prohibited, then taking the deposition of an individual charged with a criminal offense without notice to his counsel regarding matters which are relevant to the criminal charges pending against said represented individual is also clearly prohibited by the foregoing disciplinary rule"); *United States* v. *Springer*, 460 F. 2d 1344, 1354-1355 (CA7 1972) (Stevens, J., dissenting) (interview of defendant in absence of counsel would have violated DR7-104(A) in civil context and violated "procedural regularity" required by Due Process Clause in criminal context). These cases suggest the established legal principle that an attorney and his client frequently share a common identity for purposes related to the client's legal interests.

The possible reach of the Court's opinion is stunning. For the majority seems to suggest that police may deny counsel all access to a client who is being held. At least since *Escobedo* v. *Illinois*, it has been widely accepted that police may not simply deny attorneys access to their clients who are in custody. This view has survived the recasting of *Escobedo* from a Sixth Amendment to a Fifth Amendment case that the majority finds so critically important. That this prevailing view is shared *by the police* can be seen in the state-court opinions detailing various forms of police deception of attorneys.[54] For, if there were no obligation to give attorneys access, there would be no need to take elaborate steps to avoid access, such as shuttling the suspect to a different location,[55] or taking the lawyer to different locations;[56] police could simply refuse to allow the attorneys to see the suspects. But the law enforcement profession has apparently believed, quite rightly in my view, that denying lawyers access to their clients is impermissible. The Court today seems to assume that this view was error—that, from the federal constitutional perspective, the lawyer's access is, as a question from the Court put it in oral argument, merely "a matter of prosecutorial grace." Tr. of Oral Arg. 32. Certainly, nothing in the Court's Fifth and Sixth Amendment analysis acknowledges that there is *any* federal constitutional bar to an absolute denial of lawyer access to a suspect who is in police custody.

In sharp contrast to the majority, I firmly believe that the right to counsel at custodial interrogation is infringed by police treatment of an attorney that prevents or impedes the attorney's representation of the suspect at that interrogation.

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[54] See n. 10, *supra*.

[55] *State* v. *Haynes*, 288 Ore. 59, 602 P. 2d 272 (1979), cert. denied, 446 U. S. 945 (1980).

[56] *Lewis* v. *State*, 695 P. 2d 528 (Okla. Crim. App. 1984).

VI

The Court devotes precisely five sentences to its conclusion that the police interference in the attorney's representation of Burbine did not violate the Due Process Clause. In the majority's view, the due process analysis is a simple "shock the conscience" test. Finding its conscience troubled,[57] but not shocked, the majority rejects the due process challenge.

In a variety of circumstances, however, the Court has given a more thoughtful consideration to the requirements of due process. For instance, we have concluded that use of a suspect's post-*Miranda* warnings silence against him violates the due process requirement of fundamental fairness because such use breaches an implicit promise that "silence will carry no penalty."[58] Similarly, we have concluded that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment."[59] We have also concluded that vindictive prosecution violates due process;[60] so too does vindictive sentencing.[61] Indeed, we have emphasized that analysis of the "voluntariness" of a confession is frequently a "convenient shorthand" for reviewing objectionable police methods under the rubric of the due process requirement of fundamental fairness.[62] What emerges from these cases is not the majority's simple "shock the conscience" test, but the principle that due process requires fairness, integrity, and honor in the operation of the criminal justice system, and in its treatment of the citizen's cardinal constitutional protections.

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[57] See *ante*, at 424 ("[W]e share respondent's distaste for the deliberate misleading of an officer of the court").

[58] See *Wainwright* v. *Greenfield*, 474 U. S., at 295; *Doyle* v. *Ohio*, 426 U. S., at 618.

[59] *Brady* v. *Maryland*, 373 U. S. 83, 87 (1963). See also *United States* v. *Bagley*, 473 U. S. 667 (1985); *United States* v. *Agurs*, 427 U. S. 97 (1976); *Moore* v. *Illinois*, 408 U. S. 786 (1972).

[60] *Blackledge* v. *Perry*, 417 U. S. 21 (1974).

[61] *North Carolina* v. *Pearce*, 395 U. S. 711 (1969).

[62] "This Court has long held that certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment. *Brown* v. *Mississippi*, 297 U. S. 278 (1936), was the wellspring of this no-

In my judgment, police interference in the attorney-client relationship is the type of governmental misconduct on a matter of central importance to the administration of justice that the Due Process Clause prohibits. Just as the police cannot impliedly promise a suspect that his silence will not be used against him and then proceed to break that promise, so too police cannot tell a suspect's attorney that they will not question the suspect and then proceed to question him. Just as the government cannot conceal from a suspect material and exculpatory evidence, so too the government cannot conceal from a suspect the material fact of his attorney's communication.

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tion, now deeply embedded in our criminal law. Faced with statements extracted by beatings and other forms of physical and psychological torture, the Court held that confessions procured by means 'revolting to the sense of justice' could not be used to secure a conviction. *Id.*, at 286. On numerous subsequent occasions the Court has set aside convictions secured through the admission of an improperly obtained confession. . . . Although these decisions framed the legal inquiry in a variety of different ways, usually through the 'convenient shorthand' of asking whether the confession was 'involuntary,' *Blackburn* v. *Alabama*, 361 U. S. 199, 207 (1960), the Court's analysis has consistently been animated by the view that 'ours is an accusatorial and not an inquisitorial system,' *Rogers* v. *Richmond*, 365 U. S. 534, 541 (1961), and that, accordingly, tactics for eliciting inculpatory statements must fall within the broad constitutional boundaries imposed by the Fourteenth Amendment's guarantee of fundamental fairness. Indeed, even after holding that the Fifth Amendment privilege against compulsory self-incrimination applies in the context of custodial interrogations, . . . and is binding on the States, . . . the Court has continued to measure confessions against the requirements of due process. See, *e. g.*, *Mincey* v. *Arizona*, *supra*, at 402; *Beecher* v. *Alabama*, 389 U. S. 35, 38 (1967) *(per curiam).*" *Miller* v. *Fenton*, 474 U. S. 104, 109–110 (1985).

Police interference with communications between an attorney and his client violates the due process requirement of fundamental fairness. Burbine's attorney was given completely false information about the lack of questioning; moreover, she was not told that her client would be questioned regarding a murder charge about which she was unaware. Burbine, in turn, was not told that his attorney had phoned and that she had been informed that he would not be questioned. Quite simply, the Rhode Island police effectively drove a wedge between an attorney and a suspect through misinformation and omissions.

The majority does not "question that on facts more egregious than those presented here police deception might rise to a level of a due process violation." *Ante*, at 432. In my view, the police deception disclosed by this record plainly does rise to that level.

VII

This case turns on a proper appraisal of the role of the lawyer in our society. If a lawyer is seen as a nettlesome obstacle to the pursuit of wrongdoers—as in an inquisitorial society—then the Court's decision today makes a good deal of sense. If a lawyer is seen as an aid to the understanding and protection of constitutional rights—as in an accusatorial society—then today's decision makes no sense at all.

Like the conduct of the police in the Cranston station on the evening of June 29, 1977, the Court's opinion today serves the goal of insuring that the perpetrator of a vile crime is punished. Like the police on that June night as well, however, the Court has trampled on well-established legal principles and flouted the spirit of our accusatorial system of justice.

I respectfully dissent.

PEMBAUR *v.* CITY OF CINCINNATI ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 84-1160. Argued December 2, 1985—Decided March 25, 1986

Petitioner, a physician and the proprietor of a clinic in Cincinnati, Ohio, that provided medical services primarily to welfare recipients, was indicted by a grand jury for fraudulently accepting payments from state welfare agencies. During the grand jury investigation, subpoenas were issued for the appearance of two of petitioner's employees. When the employees failed to appear, the Assistant County Prosecutor obtained capiases for their detention. But when two County Deputy Sheriffs attempted to serve the capiases at petitioner's clinic, he barred the door and refused to let them enter the part of the clinic where the employees presumably were located. Thereafter, Cincinnati police officers, whom petitioner had called, appeared and told petitioner to allow the Deputy Sheriffs to enter. Petitioner continued to refuse. The Deputy Sheriffs then called their superior who told them to call the County Prosecutor's Office and to follow his instructions. The Deputy Sheriffs spoke to the Assistant Prosecutor assigned to the case. He in turn conferred with the County Prosecutor, who told him to instruct the Deputy Sheriffs to "go in and get" the employees. The Assistant Prosecutor relayed these instructions to the Deputy Sheriffs. After the Deputy Sheriffs tried unsuccessfully to force the door, city police officers obtained an axe and chopped down the door. The Deputy Sheriffs then entered and searched the clinic but were unable to locate the employees sought. Although petitioner was acquitted of the fraud charges, he was indicted and convicted for obstructing police in the performance of an authorized act. His conviction was upheld by the Ohio Supreme Court. Petitioner then filed a damages action in Federal District Court under 42 U. S. C. § 1983 against the county, among other defendants, alleging that the county had violated his rights under the Fourth and Fourteenth Amendments. The District Court dismissed the claim against the county on the ground that the individual officers were not acting pursuant to the kind of "official policy" that is the predicate for municipal liability under *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658. The Court of Appeals affirmed, holding that petitioner had failed to prove the existence of a county policy because he had shown nothing more than that on "this one occasion" the Prosecutor and the Sheriff decided to force entry into petitioner's clinic.

Held: The judgment is reversed, and the case is remanded.

746 F. 2d 337, reversed and remanded.

JUSTICE BRENNAN delivered the opinion of the Court with respect to Parts I, II–A, and II–C, concluding that:

1. The "official policy" requirement of *Monell* was intended to distinguish acts of the *municipality* from acts of the municipality's *employees*, and thereby make clear that municipal liability is limited to actions for which the municipality is actually responsible. *Monell* held that recovery from a municipality is limited to acts that are, properly speaking, "of the municipality," *i. e.*, acts that the municipality has officially sanctioned or ordered. With this understanding, it is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances. If the decision to adopt a particular course of action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly. Pp. 477–481.

2. It was error to dismiss petitioner's claim against the county. Ohio law authorizes the County Sheriff to obtain instructions from the County Prosecutor. The Sheriff followed the practice of delegating certain decisions to the Prosecutor where appropriate. In this case, the Deputy Sheriffs received instructions from the Sheriff's Office to follow the orders of the County Prosecutor, who made a considered decision based on his understanding of the law and commanded the Deputy Sheriffs to enter petitioner's clinic. That decision directly caused a violation of petitioner's Fourth Amendment rights. In ordering the Deputy Sheriffs to enter petitioner's clinic to serve the capiases on the employees, the County Prosecutor was acting as the final decisionmaker for the county, and the county may therefore be held liable under § 1983. Pp. 484–485.

JUSTICE BRENNAN, joined by JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE BLACKMUN, concluded in Part II–B that not every decision by municipal officers automatically subjects the municipality to § 1983 liability. The fact that a particular official has discretion in the exercise of particular functions does not give rise to municipal liability based on an exercise of that discretion unless the official is also responsible, under state law, for establishing final governmental policy respecting such activity. Municipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question. Pp. 481–484.

BRENNAN, J., delivered the opinion of the Court with respect to Parts I, II–A, and II–C, in which WHITE, MARSHALL, BLACKMUN, STEVENS, and

O'CONNOR (except for Part II–C), JJ., joined, and an opinion with respect to Part II–B, in which WHITE, MARSHALL, and BLACKMUN, JJ., joined. WHITE, J., filed a concurring opinion, *post*, p. 485. STEVENS, J., *post*, p. 487, and O'CONNOR, J., *post*, p. 491, filed opinions concurring in part and concurring in the judgment. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 492.

Robert E. Manley argued the cause for petitioner. With him on the briefs was *Andrew S. Lipton.*

Roger E. Friedmann argued the cause for respondents. With him on the brief was *Arthur M. Ney, Jr.**

JUSTICE BRENNAN delivered the opinion of the Court, except as to Part II–B.

In *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), the Court concluded that municipal liability under 42 U. S. C. § 1983 is limited to deprivations of federally protected rights caused by action taken "pursuant to official municipal policy of some nature . . . ." *Id.*, at 691. The question presented is whether, and in what circumstances, a decision by municipal policymakers on a single occasion may satisfy this requirement.

I

Bertold Pembaur is a licensed Ohio physician and the sole proprietor of the Rockdale Medical Center, located in the city of Cincinnati in Hamilton County. Most of Pembaur's patients are welfare recipients who rely on government assistance to pay for medical care. During the spring of 1977, Simon Leis, the Hamilton County Prosecutor, began investigating charges that Pembaur fraudulently had accepted payments from state welfare agencies for services not actually provided to patients. A grand jury was convened, and the case was assigned to Assistant Prosecutor William Whalen.

**Jack D. Novik*, *Burt Neuborne*, and *Bruce Campbell* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

In April, the grand jury charged Pembaur in a six-count indictment.

During the investigation, the grand jury issued subpoenas for the appearance of two of Pembaur's employees. When these employees failed to appear as directed, the Prosecutor obtained capiases for their arrest and detention from the Court of Common Pleas of Hamilton County.[1]

On May 19, 1977, two Hamilton County Deputy Sheriffs attempted to serve the capiases at Pembaur's clinic. Although the reception area is open to the public, the rest of the clinic may be entered only through a door next to the receptionist's window. Upon arriving, the Deputy Sheriffs identified themselves to the receptionist and sought to pass through this door, which was apparently open. The receptionist blocked their way and asked them to wait for the doctor. When Pembaur appeared a moment later, he and the receptionist closed the door, which automatically locked from the inside, and wedged a piece of wood between it and the wall. Returning to the receptionist's window, the Deputy Sheriffs identified themselves to Pembaur, showed him the capiases and explained why they were there. Pembaur refused to let them enter, claiming that the police had no legal authority to be there and requesting that they leave. He told them that he had called the Cincinnati police, the local media, and his lawyer. The Deputy Sheriffs decided not to take further action until the Cincinnati police arrived.

Shortly thereafter, several Cincinnati police officers appeared. The Deputy Sheriffs explained the situation to them and asked that they speak to Pembaur. The Cincinnati police told Pembaur that the papers were lawful and that he should allow the Deputy Sheriffs to enter. When Pembaur refused, the Cincinnati police called for a superior officer. When he too failed to persuade Pembaur to open the door, the Deputy Sheriffs decided to call their supervisor for further instructions. Their supervisor told them to call Assistant Prosecutor Whalen and to follow his instructions. The Deputy Sheriffs then telephoned Whalen and informed him of the situation. Whalen conferred with County Prosecutor Leis, who told Whalen to instruct the Deputy Sheriffs to "go in and get [the witnesses]." Whalen in turn passed these instructions along to the Deputy Sheriffs.

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[1] A capias is a writ of attachment commanding a county official to bring a subpoenaed witness who has failed to appear before the court to testify and to answer for civil contempt. See Ohio Rev. Code Ann. § 2317.21 (1981).

After a final attempt to persuade Pembaur voluntarily to allow them to enter, the Deputy Sheriffs tried unsuccessfully to force the door. City police officers, who had been advised of the County Prosecutor's instructions to "go in and get" the witnesses, obtained an axe and chopped down the door. The Deputy Sheriffs then entered and searched the clinic. Two individuals who fit descriptions of the witnesses sought were detained, but turned out not to be the right persons.

After this incident, the Prosecutor obtained an additional indictment against Pembaur for obstructing police in the performance of an authorized act. Although acquitted of all other charges, Pembaur was convicted for this offense. The Ohio Court of Appeals reversed, reasoning that Pembaur was privileged under state law to exclude the deputies because the search of his office violated the Fourth Amendment. *State* v. *Pembaur*, No. C–790380 (Hamilton County Court of Appeals, Nov. 3, 1982). The Ohio Supreme Court reversed and reinstated the conviction. *State* v. *Pembaur*, 9 Ohio St. 3d 136, 459 N. E. 2d 217, cert. denied, 467 U. S. 1219 (1984). The Supreme Court held that the state-law privilege applied only to bad-faith conduct by law enforcement officials, and that, under the circumstances of this case, Pembaur was obliged to acquiesce to the search and seek redress later in a civil action for damages. 9 Ohio St. 3d, at 138, 459 N. E. 2d, at 219.

On April 20, 1981, Pembaur filed the present action in the United States District Court for the Southern District of Ohio against the city of Cincinnati, the County of Hamilton, the Cincinnati Police Chief, the Hamilton County Sheriff, the members of the Hamilton Board of County Commissioners (in their official capacities only), Assistant Prosecutor Whalen, and nine city and county police officers.[2] Pembaur sought damages under 42 U. S. C. § 1983, alleging that the county and city police had violated his rights under the Fourth and Fourteenth Amendments. His theory was that, absent exigent circumstances, the Fourth Amendment prohibits police from searching an individual's home or business without a search warrant even to execute an arrest warrant for a third person. We agreed with that proposition in *Steagald* v. *United States*, 451 U. S. 204 (1981), decided the day after Pembaur filed this lawsuit. Pembaur sought $10 million in actual and $10 million in punitive damages, plus costs and attorney's fees.

Much of the testimony at the 4-day trial concerned the practices of the Hamilton County Police in serving capiases. Frank Webb, one of the Deputy Sheriffs present at the clinic on May 19, testified that he had previously served capiases on the property of third persons without a search warrant, but had never been required to use force to gain access. Assistant Prosecutor Whalen was also unaware of a prior instance in which police had been denied access to a third person's property in serving a capias and had used force to gain entry. Lincoln Stokes, the County Sheriff, testified that the Department had no written policy respecting the serving of capiases on the property of third persons and that the proper response in any given situation would depend upon the circumstances. He too could not recall a specific instance in which entrance had been denied and forcibly gained. Sheriff Stokes did testify, however, that it was the practice in his Department to refer questions to the County Prosecutor for instructions under appropriate circumstances and that "it was the proper thing to do" in this case.

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[2] Hamilton County Prosecutor Leis was not made a defendant because counsel for petitioner believed that Leis was absolutely immune. Tr., Mar. 14–Mar. 17, p. 267. We express no view as to the correctness of this evaluation. Cf. *Imbler* v. *Pachtman*, 424 U. S. 409, 430–431 (1976) (leaving open the question of a prosecutor's immunity when he acts "in the role of an administrator or investigative officer rather than that of an advocate").

The District Court awarded judgment to the defendants and dismissed the complaint in its entirety. The court agreed that the entry and search of Pembaur's clinic violated the Fourth Amendment under *Steagald*, *supra*, but held *Steagald* inapplicable since it was decided nearly four years after the incident occurred. Because it construed the law in the Sixth Circuit in 1977 to permit law enforcement officials to enter the premises of a third person to serve a capias, the District Court held that the individual municipal officials were all immune under *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982).

The claims against the county and the city were dismissed on the ground that the individual officers were not acting pursuant to the kind of "official policy" that is the predicate for municipal liability under *Monell*. With respect to Hamilton County, the court explained that, even assuming that the entry and search were pursuant to a governmental policy, "it was not a policy of Hamilton County *per se*" because "[t]he Hamilton County Board of County Commissioners, acting on behalf of the county, simply does not establish or control the policies of the Hamilton County Sheriff." With respect to the city of Cincinnati, the court found that "the only policy or custom followed . . . was that of aiding County Sheriff's Deputies in the performance of their duties." The court found that any participation by city police in the entry and search of the clinic resulted from decisions by individual officers as to the permissible scope of assistance they could provide, and not from a city policy to provide this particular kind of assistance.

On appeal, Pembaur challenged only the dismissal of his claims against Whalen, Hamilton County, and the city of Cincinnati. The Court of Appeals for the Sixth Circuit upheld the dismissal of Pembaur's claims against Whalen and Hamilton County, but reversed the dismissal of his claim against the city of Cincinnati on the ground that the District Court's findings concerning the policies followed by the Cincinnati police were clearly erroneous. 746 F. 2d 337 (1984).[3]

The Court of Appeals affirmed the District Court's dismissal of Pembaur's claim against Hamilton County, but on different grounds. The court held that the County Board's lack of control over the Sheriff would not preclude county liability if "the nature and duties of the Sheriff are such that his acts may fairly be said to represent the county's official policy with respect to the specific subject matter." *Id.*, at 340–341. Based upon its examination of Ohio law, the Court of Appeals found it "clea[r]" that the Sheriff and the Prosecutor were both county officials authorized to establish "the official policy of Hamilton County" with respect to matters of law enforcement. *Id.*, at 341. Notwithstanding these conclusions, however, the court found that Pembaur's claim against the county had been properly dismissed:

> "We believe that Pembaur failed to prove the existence of a county policy in this case. Pembaur claims that the deputy sheriffs acted pursuant to the policies of the Sheriff and Prosecutor by forcing entry into the medical center. Pembaur has failed to establish, however, anything more than that, on this *one occasion*, the Prosecutor and the Sheriff decided to force entry into his office. . . . That single, discrete decision is insufficient,

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[3] The court found that there was a city policy respecting the use of force in serving capiases as well as a policy of aiding county police. It based this conclusion on the testimony of Cincinnati Chief of Police Myron Leistler, who stated that it was the policy of his Department to take whatever steps were necessary, including the forcing of doors, to serve an arrest document. 746 F. 2d, at 341–342; see also, Tr., Mar. 14–Mar. 17, pp. 43–45, 46–47. The court remanded the case for a determination whether Pembaur's injury was incurred as a result of the execution of this policy. 746 F. 2d, at 342.

> by itself, to establish that the Prosecutor, the Sheriff, or both were implementing a governmental policy." *Ibid.* (footnote omitted) (emphasis in original).

Pembaur petitioned for certiorari to review only the dismissal of his claim against Hamilton County. The decision of the Court of Appeals conflicts with holdings in several other Courts of Appeals,[4] and we granted the petition to resolve the conflict. 472 U. S. 1016 (1985). We reverse.

II

A

Our analysis must begin with the proposition that "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Monell* v. *New York City Dept. of Social Services*, 436 U. S., at 691.[5] As we read its opinion, the Court of Appeals held that a single decision to take particular action, although made by municipal policymakers, cannot establish the kind of "official policy" required by *Monell* as a predicate to municipal liability under § 1983.[6] The Court of Appeals reached this conclusion without referring to *Monell*—indeed, without any explanation at all. However, examination of the opinion in *Monell* clearly demonstrates that the Court of Appeals misinterpreted its holding.

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[4] See, *e. g.*, *McKinley* v. *City of Eloy*, 705 F. 2d 1110, 1116–1117 (CA9 1983); *Berdin* v. *Duggan*, 701 F. 2d 909, 913–914 (CA11), cert. denied, 464 U. S. 893 (1983); *Van Ooteghem* v. *Gray*, 628 F. 2d 488, 494–495 (CA5 1980), cert. denied, 455 U. S. 909 (1982); *Quinn* v. *Syracuse Model Neighborhood Corp.*, 613 F. 2d 438, 448 (CA2 1980). See also *Sanders* v. *St. Louis County*, 724 F. 2d 665, 668 (CA8 1983) *(per curiam)* ("It may be that one act of a senior county official is enough to establish the liability of the county, if that official was in a position to establish policy and if that official himself directly violated another's constitutional rights"). But see *Losch* v. *Borough of Parkesburg, Pa.*, 736 F. 2d 903, 910–911 (CA3 1984) ("[E]ven if [the Police Chief] were the final authority with regard to police activities, . . . there is no regulation or evidence of any repeated action by [the chief] . . . that can transmute his actions in the Losch incident into a general Borough policy").

[5] There is no question in this case that petitioner suffered a constitutional deprivation. The Court of Appeals found, and respondent concedes, that the entry and search of petitioner's clinic violated the Fourth Amendment under *Steagald* v. *United States*, 451 U. S. 204 (1981). See 746 F. 2d, at 340, n. 1; Brief for Respondents 11. Respondent never challenged and has in fact also conceded that *Steagald* applies retroactively to this case. See Tr. of Oral Arg. 26–27. We decide this case in light of respondent's concessions.

Monell is a case about responsibility. In the first part of the opinion, we held that local government units could be made liable under § 1983 for deprivations of federal rights, overruling a contrary holding in *Monroe* v. *Pape*, 365 U. S. 167 (1961). In the second part of the opinion, we recognized a limitation on this liability and concluded that a municipality cannot be made liable by application of the doctrine of *respondeat superior*. See *Monell*, 436 U. S., at 691. In part, this conclusion rested upon the language of § 1983, which imposes liability only on a person who "subjects, or causes to be subjected," any individual to a deprivation of federal rights; we noted that this language "cannot easily be read to impose liability vicariously on government bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor." *Id.*, at 692. Primarily, however, our conclusion rested upon the legislative history, which disclosed that, while Congress never questioned its power to impose civil liability on municipalities for their *own* illegal acts, Congress did doubt its constitutional power to impose such liability in order to oblige municipalities to control the conduct of *others*. *Id.*, at 665–683.[7] We found that, because of these doubts, Congress chose not to create such obligations in § 1983. Recognizing that this would be the effect of a federal law of *respondeat superior*, we concluded that § 1983 could not be interpreted to incorporate doctrines of vicarious liability. *Id.*, at 692–694, and n. 57.

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[6] The opinion below also can be read as holding that municipal liability cannot be imposed for a single incident of unconstitutional *conduct* by municipal employees whether or not that conduct is pursuant to municipal *policy*. Such a conclusion is unsupported by either the language or reasoning of *Monell*, or by any of our subsequent decisions. As we explained last Term in *Oklahoma City* v. *Tuttle*, 471 U. S. 808 (1985), once a municipal policy is established, "it requires only one application . . . to satisfy fully *Monell*'s requirement that a municipal corporation be held liable only for constitutional violations resulting from the municipality's official policy." *Id.*, at 822 (plurality opinion); see also, *id.*, at 831–832 (BRENNAN, J., concurring in part and concurring in judgment.). The only issue before us, then, is whether petitioner satisfied *Monell*'s requirement that the tortious conduct be pursuant to "official municipal policy."

The conclusion that tortious conduct, to be the basis for municipal liability under § 1983, must be pursuant to a municipality's "official policy" is contained in this discussion. The "official policy" requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible.[8] *Monell* reasoned that recovery from a municipality is limited to acts that are, properly speaking, acts "of the municipality"—that is, acts which the municipality has officially sanctioned or ordered.

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[7] This legislative history is discussed at length in *Monell* and need only be summarized here. The distinction between imposing liability on municipalities for their own violations and imposing liability to force municipalities to prevent violations by others was made by Members of the House of Representatives who successfully opposed the "Sherman amendment" to the Civil Rights Act of 1871, 17 Stat. 13, the precursor of § 1983. The Sherman amendment sought to impose civil liability on municipalities for damage done to the person or property of its inhabitants by private persons "riotously and tumultuously assembled." Cong. Globe, 42d Cong., 1st Sess., 749 (1871) (quoted in *Monell*, 436 U. S., at 664). Opponents of the amendment argued that, in effect, it imposed an obligation on local governments to keep the peace, and that the Federal Government could not constitutionally require local governments to keep the peace if state law did not. This argument succeeded in blocking passage of the amendment. However, even the opponents of the Sherman amendment recognized Congress' power to impose civil liability on a local government already obligated to keep the peace by state law if that government failed to do so and thereby violated the Fourteenth Amendment. See *id.*, at 665–683.

With this understanding, it is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances. No one has ever doubted, for instance, that a municipality may be liable under § 1983 for a single decision by its properly constituted legislative body—whether or not that body had taken similar action in the past or intended to do so in the future—because even a single decision by such a body unquestionably constitutes an act of official government policy. See, *e. g.*, *Owen* v. *City of Independence*, 445 U. S. 622 (1980) (City Council passed resolution firing plaintiff without a pretermination hearing); *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247 (1981) (City Council canceled license permitting concert because of dispute over content of performance). But the power to establish policy is no more the exclusive province of the legislature at the local level than at the state or national level. *Monell*'s language makes clear that it expressly envisioned other officials "whose acts or edicts may fairly be said to represent official policy," *Monell*, *supra*, at 694, and whose decisions therefore may give rise to municipal liability under § 1983.

Indeed, any other conclusion would be inconsistent with the principles underlying § 1983. To be sure, "official policy" often refers to formal rules or understandings—often but not always committed to writing—that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time. That was the case in *Monell* itself, which involved a written rule requiring pregnant employees to take unpaid leaves of absence before such leaves were medically necessary. However, as in *Owen* and *Newport*, a government frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations. If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government "policy" as that term is commonly understood.[9] More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly. To deny compensation to the victim would therefore be contrary to the fundamental purpose of § 1983.

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[8] Thus, our statement of the conclusion juxtaposes the policy requirement with imposing liability on the basis of *respondeat superior:*

"We conclude, therefore, that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy . . . , whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.*, at 694.

B

Having said this much, we hasten to emphasize that not every decision by municipal officers automatically subjects the municipality to § 1983 liability. Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered.[10] The fact that a particular official—even a policymaking official—has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion. See, *e. g.*, *Oklahoma City* v. *Tuttle*, 471 U. S., at 822–824.[11] The offi-

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[9] While the dictionary is not the source definitively to resolve legal questions, we note that this description of "policy" is consistent with the word's ordinary definition. For example, Webster's defines the word as "a specific decision or set of decisions designed to carry out such a chosen course of action." Webster's Third New International Dictionary 1754 (1981). Similarly, the Oxford English Dictionary defines "policy" as "[a] course of action adopted and pursued by a government, party, ruler, statesman, etc.; any course of action adopted as advantageous or expedient." VII Oxford English Dictionary 1071 (1933). See also, Webster's New Twentieth Century Dictionary 1392 (2d ed. 1979) ("any governing principle, plan, or course of action"); Random House Dictionary 1113 (1966) ("a course of action adopted and pursued by a government, ruler, political party, etc.").

[10] Section 1983 also refers to deprivations under color of a state "custom or usage," and the Court in *Monell* noted accordingly that "local govern-

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ments, like every other § 1983 'person,' . . . may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." 436 U. S., at 690–691. A § 1983 plaintiff thus may be able to recover from a municipality without adducing evidence of an affirmative decision by policymakers if able to prove that the challenged action was pursuant to a state "custom or usage." Because there is no allegation that the action challenged here was pursuant to a local "custom," this aspect of *Monell* is not at issue in this case.

[11] Respondent argues that the holding in *Tuttle* is far broader than this. It relies on the statement near the end of JUSTICE REHNQUIST's plurality opinion that "[p]roof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell* unless proof of the incident includes proof that it was caused by an *existing*, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker." 471 U. S., at 823–824 (emphasis added). Respondent contends that a policy cannot be said to be "existing" unless similar action has been taken in the past.

This reading of the *Tuttle* plurality is strained, and places far too much weight on a single word. The plaintiff in *Tuttle* alleged that a police officer's use of excessive force deprived her decedent of life without due process of law. The plaintiff proved only a single instance of unconstitutional action by a nonpolicymaking employee of the city. She argued that the city had "caused" the constitutional deprivation by adopting a "policy" of inadequate training. The trial judge instructed the jury that a single, unusually excessive use of force may warrant an inference that it was attributable to grossly inadequate training, and that the municipality could be held liable on this basis. We reversed the judgment against the city. Although there was no opinion for the Court on this question, both the plurality and the opinion concurring in the judgment found plaintiff's submission inadequate because she failed to establish that the unconstitutional act was taken *pursuant to* a municipal policy rather than simply resulting from such a policy in a "but for" sense. *Id.*, at 822–824 (plurality opinion), 829–830 (BRENNAN, J., concurring in part and concurring in judgment). That conclusion is entirely consistent with our holding today that the policy which ordered or authorized an unconstitutional act can be established by a single decision by proper municipal policymakers.

cial must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable.[12] Authority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority, and of course, whether an official had final policymaking authority is a question of state law. However, like other governmental entities, municipalities often spread policymaking authority among various officers and official bodies. As a result, particular officers may have authority to establish binding county policy respecting particular matters and to adjust that policy for the county in changing circumstances. To hold a municipality liable for actions ordered by such officers exercising their policymaking authority is no more an application of the theory of *respondeat superior* than was holding the municipalities liable for the decisions of the City Councils in *Owen* and *Newport*. In each case municipal liability attached to a single decision to take unlawful action made by municipal policymakers. We hold that municipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question. See *Tuttle*, *supra*, at 823 ("'policy' generally implies a course of action consciously chosen from among various alternatives").

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[12] Thus, for example, the County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing county employment policy. If this were the case, the Sheriff's decisions respecting employment would not give rise to municipal liability, although similar decisions with respect to law enforcement practices, over which the Sheriff *is* the official policymaker, *would* give rise to municipal liability. Instead, if county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability. This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff exercised that discretion in an unconstitutional manner; the decision to act unlawfully would not be a decision of the Board. However, if the Board delegated its power to establish final employment policy to the Sheriff, the Sheriff's decisions *would* represent county policy and could give rise to municipal liability.

C

Applying this standard to the case before us, we have little difficulty concluding that the Court of Appeals erred in dismissing petitioner's claim against the county. The Deputy Sheriffs who attempted to serve the capiases at petitioner's clinic found themselves in a difficult situation. Unsure of the proper course of action to follow, they sought instructions from their supervisors. The instructions they received were to follow the orders of the County Prosecutor. The Prosecutor made a considered decision based on his understanding of the law and commanded the officers forcibly to enter petitioner's clinic. That decision directly caused the violation of petitioner's Fourth Amendment rights.

Respondent argues that the County Prosecutor lacked authority to establish municipal policy respecting law enforcement practices because only the County Sheriff may establish policy respecting such practices. Respondent suggests that the County Prosecutor was merely rendering "legal advice" when he ordered the Deputy Sheriffs to "go in and get" the witnesses. Consequently, the argument concludes, the action of the individual Deputy Sheriffs in following this advice and forcibly entering petitioner's clinic was not pursuant to a properly established municipal policy.

We might be inclined to agree with respondent if we thought that the Prosecutor had only rendered "legal advice." However, the Court of Appeals concluded, based upon its examination of Ohio law, that both the County Sheriff and the County Prosecutor could establish county policy under appropriate circumstances, a conclusion that we do not question here.[13] Ohio Rev. Code Ann. § 309.09(A) (1979) provides that county officers may "require . . . instructions from [the County Prosecutor] in matters connected with their official duties." Pursuant to standard office procedure, the Sheriff's Office referred this matter to the Prosecutor and then followed his instructions. The Sheriff testified that his Department followed this practice under appropriate circumstances and that it was "the proper thing to do" in this case. We decline to accept respondent's invitation to overlook this delegation of authority by disingenuously labeling the Prosecutor's clear command mere "legal advice." In ordering the Deputy Sheriffs to enter petitioner's clinic the County Prosecutor was acting as the final decisionmaker for the county, and the county may therefore be held liable under § 1983.

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[13] We generally accord great deference to the interpretation and application of state law by the courts of appeals. *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense*, 467 U. S. 797, 815, n. 12 (1984); *Brockett*

The decision of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE WHITE, concurring.

The forcible entry made in this case was not then illegal under federal, state, or local law. The city of Cincinnati frankly conceded that forcible entry of third-party property to effect otherwise valid arrests was standard operating procedure. There is no reason to believe that respondent county would abjure using lawful means to execute the capiases issued in this case or had limited the authority of its officers to use force in executing capiases. Further, the county officials who had the authority to approve or disapprove such entries opted for the forceful entry, a choice that was later held to be inconsistent with the Fourth Amendment. Vesting discretion in its officers to use force and its use in this case sufficiently manifested county policy to warrant reversal of the judgment below.

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v. *Spokane Arcades, Inc.*, 472 U. S. 491, 499–500 (1985) (citing cases); see also *Bishop* v. *Wood*, 426 U. S. 341, 345–347 (1976).

This does not mean that every act of municipal officers with final authority to effect or authorize arrests and searches represents the policy of the municipality. It would be different if *Steagald* v. *United States*, 451 U. S. 204 (1981), had been decided when the events at issue here occurred, if the State Constitution or statutes had forbidden forceful entries without a warrant, or if there had been a municipal ordinance to this effect. Local law enforcement officers are expected to obey the law and ordinarily swear to do so when they take office. Where the controlling law places limits on their authority, they cannot be said to have the authority to make contrary policy. Had the Sheriff or Prosecutor in this case failed to follow an existing warrant requirement, it would be absurd to say that he was nevertheless executing county policy in authorizing the forceful entry in this case and even stranger to say that the county would be liable if the Sheriff had secured a warrant and it turned out that he and the Magistrate had mistakenly thought there was probable cause for the warrant. If deliberate or mistaken acts like this, admittedly contrary to local law, expose the county to liability, it must be on the basis of *respondeat superior* and not because the officers' acts represent local policy.

Such results would not conform to *Monell* and the cases following it. I do not understand the Court to hold otherwise in stating that municipal liability attaches where "a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Ante*, at 483–484. A sheriff, for example, is not the final policymaker with respect to the probable-cause requirement for a valid arrest. He has no alternative but to act in accordance with the established standard; and his deliberate or mistaken departure from the controlling law of arrest would not represent municipal policy.

In this case, however, the Sheriff and the Prosecutor chose a course that was not forbidden by any applicable law, a choice that they then had the authority to make. This was county policy, and it was no less so at the time because a later decision of this Court declared unwarranted forceful entry into third-party premises to be violation of the Fourth Amendment.* Hence, I join the Court's opinion and judgment.

JUSTICE STEVENS, concurring in part and concurring in the judgment.

This is not a hard case. If there is any difficulty, it arises from the problem of obtaining a consensus on the meaning of the word "policy"—a word that does not appear in the text of 42 U. S. C. § 1983, the statutory provision that we are supposed to be construing. The difficulty is thus a consequence of this Court's lawmaking efforts rather than the work of the Congress of the United States.[1]

With respect to both the merits of the constitutional claim and the county's liability for the unconstitutional activities of its agents performed in the course of their official duties, there can be no doubt that the Congress that enacted the Ku Klux Act in 1871 intended the statute to authorize a recovery in a case of this kind. When police officers chopped down the door to petitioner's premises in order to serve capiases on two witnesses, they violated petitioner's constitutional rights. *Steagald* v. *United States*, 451 U. S. 204 (1981),

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*The county has not challenged the retroactivity of *Steagald* v. *United States*, 451 U. S. 204 (1981), and I do not address that issue.

[1] See *Oklahoma City* v. *Tuttle*, 471 U. S. 808, 841 (1985) (STEVENS, J., dissenting) ("While the Court purports to answer a question of statutory construction . . . its opinion actually provides us with an interpretation of the word 'policy' as it is used in Part II of the opinion in *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 690–695 (1978). The word 'policy' does not appear in the text of § 1983, but it provides the theme for today's decision"). It may be significant that the issue has apparently become, not the purpose and scope of 42 U. S. C. § 1983, but the nature of the liability "envisioned" by this Court "in *Monell.*" *Post*, at 491 (O'CONNOR, J., concurring in part and concurring in judgment); *post*, at 499 (POWELL, J., dissenting).

makes it perfectly clear that forcible entry to a third party's premises to execute an arrest warrant is unconstitutional if the entry is without a search warrant and in the absence of consent or exigent circumstances.[2] In my view, it is not at all surprising that respondents have "conceded" the retroactivity of *Steagald*. For *Steagald* plainly presented its holding as compelled by, and presaged in, well-established precedent.[3]

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[2] Indeed, it can be argued that the justification for a forcible entry to serve a capias, as in this case, is even weaker than the justification for a forcible entry to execute an arrest warrant, as in *Steagald*. Since the Sixth Circuit in this action, 746 F. 2d 337 (1984), and the Ohio Supreme Court in reviewing petitioner's conviction, *State* v. *Pembaur*, 9 Ohio St. 3d 136, 459 N. E. 2d 217, cert. denied, 467 U. S. 1219 (1984), did not distinguish between the two situations, however, and since the forcible entry was unconstitutional under either conception, it is unnecessary to rest on that possible difference.

[3] See 451 U. S., at 211 ("Except in [cases of consent or exigent circumstances], we have consistently held that the entry into a home to conduct a search or make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant"); *id.*, at 213–214 ("In the absence of exigent circumstances, we have consistently held that such judicially untested determinations are not reliable enough to justify an entry into a person's home to arrest him without a warrant, or a search of a home for objects in the absence of a search warrant. . . . We see no reason to depart from this settled course when the search of a home is for a person rather than an object"); *id.*, at 216 ("Since warrantless searches of a home are impermissible absent consent or exigent circumstances, we conclude that the instant search violated the Fourth Amendment"); *id.*, at 219 ("[I]f anything, the little guidance that can be gleaned from common-law authorities undercuts the Government's position. The language of *Semayne's Case*, [5 Co. Rep. 91a, 77 Eng. Rep. 194 (K. B. 1603)], . . . suggests that although the subject of an arrest warrant could not find sanctuary in the home of the third party, the home remained a 'castle or privilege' for its residents. Similarly several [common-law] commentators suggested that a search warrant, rather than an arrest warrant, was necessary to fully insulate a constable from an action for trespass brought by a party whose home was searched"); *id.*, at 220 ("[T]he history of the Fourth Amendment strongly suggests that its Framers would not have sanctioned the instant search").

The fact that the Sixth Circuit and two other Circuits had reached a contrary conclusion does not transform *Steagald* into a nonretroactive opinion. This Court has never suggested that resolution of a split in the Circuits

Similarly, if we view the question of municipal liability from the perspective of the Legislature that enacted the Ku Klux Act of 1871, the answer is clear. The legislative history indicating that Congress did not intend to impose civil liability on municipalities for the conduct of third parties, *ante*, at 478–479, and n. 7, merely confirms the view that it did intend to impose liability for the governments' own illegal acts—including those acts performed by their agents in the course of their employment. In other words, as I explained in my dissent in *Oklahoma City* v. *Tuttle*, 471 U. S. 808, 835–840 (1985), both the broad remedial purpose of the statute and the fact that it embodied contemporaneous common-law doctrine, including *respondeat superior*, require a conclusion that Congress intended that a governmental entity be liable for the constitutional deprivations committed by its agents in the course of their duties.[4]

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somehow means that a holding is presumptively nonretroactive in the Circuits that have disagreed with the Court's ultimate conclusion. Furthermore, the suggestion that there is a more compelling need for nonretroactivity in a civil context than in a criminal context, *post*, at 492–496 (POWELL, J., dissenting), ignores the fact that, in a civil context, there is not the societal cost of reversing convictions. Cf. *Johnson* v. *New Jersey*, 384 U. S. 719, 731 (1966) ("[R]etroactive application of *Escobedo* [v. *Illinois*, 378 U. S. 478 (1964),] and *Miranda* [v. *Arizona*, 384 U. S. 436 (1966),] would seriously disrupt the administration of our criminal laws. It would require the retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards"). Additionally, *Payton* v. *New York*, 445 U. S. 573 (1980), which *Steagald* cites and discusses, has, of course, been held retroactive in the only context in which the Court has considered the issue. See *United States* v. *Johnson*, 457 U. S. 537 (1982).

[4] Several commentators have concluded that the dicta in *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), regarding *respondeat superior* misreads the legislative history of § 1983. See, *e. g.*, Blum, From *Monroe* to *Monell*: Defining the Scope of Municipal Liability in Federal Courts, 51 Temp. L.Q. 409, 413, n. 15 (1978) ("The interpretation adopted by the Court with respect to the rejection of vicarious liability under § 1983 had been espoused prior to *Monell* by one author who drew a distinction between 'political' § 1983 cases, in which a city itself causes the constitutional violation, and 'constitutional tort' § 1983 cases, in which an

Finally, in construing the scope of § 1983, the Court has sometimes referred to "considerations of public policy."[5] To the extent that such "policy" concerns are relevant, they also support a finding of county liability. A contrary construction would produce a most anomalous result. The primary responsibility for protecting the constitutional rights of the residents of Hamilton County from the officers of Hamilton County should rest on the shoulders of the county itself, rather than on the several agents who were trying to perform their jobs. Although I recognize that the county may provide insurance protection for its agents, I believe that the primary party against whom the judgment should run is the county itself. The county has the resources and the authority that can best avoid future constitutional violations and provide a fair remedy for those that have occurred in the past. Thus, even if "public policy" concerns should inform the construction of § 1983, those considerations, like the statute's remedial purpose and common-law background, support

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attempt is made to impose vicarious liability on the city for the misconduct of its employees. . . . Although this view of § 1983 may represent a sensitive response to the fiscal plight of municipal corporations today, it should not be acknowledged as a legitimate interpretation of congressional intent in 1871"); Note, Section 1983 Municipal Liability and the Doctrine of Respondeat Superior, 46 U. Chi. L. Rev. 935, 936 (1979) ("[T]he purposes and legislative history of the provision demand a scheme of respondeat superior liability"); Note, *Monell v. Department of Social Services:* One Step Forward and a Half Step Back for Municipal Liability Under Section 1983, 7 Hofstra L. Rev. 893, 921 (1979) ("Analysis of the legislative history of section 1983 does not indicate that Congress intended to exclude respondeat superior from the act. The language of the statute similarly offers no such proof. Since both were relied on by the Court in *Monell*, the dicta in that decision is, at best, poorly reasoned authority for the proposition that a municipality is not liable for the unauthorized acts of its employees"); Comment, Municipal Liability under Section 1983 for Civil Rights Violations After *Monell*, 64 Iowa L. Rev. 1032, 1045 (1979) ("The Court's *[respondeat superior]* limitation . . . is not justified by the legislative history of section 1983 or by policy considerations").

[5] *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 266 (1981); *Owen* v. *City of Independence*, 445 U. S. 622, 650 (1980).

a conclusion of county liability for the unconstitutional, axe-swinging entry in this case.

Because I believe that Parts I, II–A, and II–C are consistent with the purpose and policy of § 1983, as well as with our precedents, I join those Parts of the Court's opinion[6] and concur in the judgment.

JUSTICE O'CONNOR, concurring in part and concurring in the judgment.

For the reasons stated by JUSTICE WHITE, I agree that the municipal officers here were acting as policymakers within the meaning of *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978). As the city of Cincinnati freely conceded, forcible entry of third-party property to effect an arrest was standard operating procedure in May 1977. Given that this procedure was consistent with federal, state, and local law at the time the case arose, it seems fair to infer that respondent county's policy was no different. Moreover, under state law as definitively construed by the Court of Appeals, the county officials who opted for the forcible entry "had the authority to approve or disapprove such entries." *Ante*, at 485 (WHITE J., concurring). Given this combination of circumstances, I agree with JUSTICE WHITE that the decision to break down the door "sufficiently manifested county policy to warrant reversal of the judgment below." *Ibid.* Because, however, I believe that the reasoning of the majority goes beyond that necessary to decide the case, and because I fear that the standard the majority articulates may be misread to expose municipalities to liability beyond that envisioned by the Court in *Monell*, I join only Parts I and II–A of the Court's opinion and the judgment.

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[6] The reasons for my not joining Parts II and IV of *Monell*, 436 U. S. at 714 (STEVENS, J., concurring in part), are also applicable to my decision not to join Part II–B of this opinion.

JUSTICE POWELL, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, dissenting.

The Court today holds Hamilton County liable for the forcible entry in May 1977 by Deputy Sheriffs into petitioner's office. The entry and subsequent search were pursuant to capiases for third parties—petitioner's employees—who had failed to answer a summons to appear as witnesses before a grand jury investigating petitioner. When petitioner refused to allow the Sheriffs to enter, one of them, at the request of his supervisor, called the office of the County Prosecutor for instructions. The Assistant County Prosecutor received the call, and apparently was in doubt as to what advice to give. He referred the question to the County Prosecutor, who advised the Deputy Sheriffs to "go in and get them [the witnesses]" pursuant to the capiases.

This five-word response to a single question over the phone is now found by this Court to have created an official county policy for which Hamilton County is liable under § 1983. This holding is wrong for at least two reasons. First, the Prosecutor's response and the Deputies' subsequent actions did not violate any constitutional right that existed at the time of the forcible entry. Second, no official county policy could have been created solely by an offhand telephone response from a busy County Prosecutor.

I

Petitioner's allegation of a constitutional violation rests exclusively on *Steagald* v. *United States*, 451 U. S. 204 (1981), decided four years after the entry here. In *Steagald* we held that an officer may not search for the subject of an arrest warrant in a third party's home without first obtaining a search warrant, unless the search is consensual or justified by exigent circumstances. In 1977, the law in the Sixth Circuit was that a search warrant was not required in such situations if the police had an arrest warrant and reason to believe that the person to be arrested was within the home to be searched. *United States* v. *McKinney*, 379 F. 2d 259, 262–263 (1967). That view was shared by at least two other Circuits. See *United States* v. *Gaultney*, 606 F. 2d 540, 544–545 (CA5 1979); *United States* v. *Harper*, 550 F. 2d 610, 612–614 (CA10), cert. denied, 434 U. S. 837 (1977). Another Circuit had favored that view in dicta. See *United States* v. *Manley*, 632 F. 2d 978, 983 (CA2 1980). Thus, under the governing law in the applicable Circuit, uncontradicted by any opinion of this Court, the entry into petitioner's office pursuant to an arrest warrant was not a violation of petitioner's Fourth Amendment rights.

The only way to transform this search—legitimate at the time—into a constitutional violation is to apply *Steagald* retroactively. This would not be a startling proposition if all that petitioner sought was retroactive application of a new rule of criminal law to a direct appeal from his criminal conviction.[1] But petitioner seeks something very different—retroactive application of the new rule of criminal law announced in *Steagald* to his subsequent civil lawsuit. Even if one accepts the proposition that a new rule of criminal law should be applied retroactively to create a basis for civil liability under § 1983,[2] existing principles of retroactivity for civil cases show that *Steagald* should not be applied retroactively to this action.

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[1] In fact, on direct appeal from his criminal conviction, petitioner did enjoy retroactive application of the rule in *Steagald*, although it did not entitle him to reversal of his conviction. *State* v. *Pembaur*, 9 Ohio St. 3d 136, 459 N. E. 2d 217 (1984). While the Ohio Supreme Court did not specifically address the retroactivity issue, it did discuss the applicability of *Steagald* to petitioner's criminal appeal. 9 Ohio St. 3d, at 137–138, 459 N. E. 2d, at 218–219. The court reasoned, however, that because no "substantive" offense was involved, but only a conviction for obstructing the police, petitioner could not rely on the unconstitutionality of the search as a defense. *Id.*, at 138, 459 N. E. 2d, at 219.

[2] If new criminal rules are so applied, it is possible that a person could obtain the benefit of retroactive application of a new criminal rule to his civil § 1983 case, even though he could not use the new rule to attack his conviction collaterally. A prisoner literally could be forced to remain in prison while collecting his civil damages award. In *Shea* v. *Louisiana*, 470 U. S. 51 (1985), the Court created a distinction between retroactivity on

The leading case explaining the framework of analysis for civil retroactivity is *Chevron Oil Co.* v. *Huson*, 404 U. S. 97 (1971). Under *Chevron*, a court must assess: (i) whether the new decision "establish[ed] a new principle of law . . . by overruling clear past precedent . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed," *id.*, at 106; (ii) "the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation," *id.*, at 107; and (iii) the respective inequities of retroactive or nonretroactive application, *ibid.*

When viewed in light of these factors, retroactive application of *Steagald* is not justified. First, *Steagald* overruled past Courts of Appeals precedent, and the decision had not been foreshadowed in opinions of this Court. The governing law in three Federal Circuits permitted searches of third parties' homes pursuant to an arrest warrant, see *supra*, at 493, and earlier decisions of this Court arguably supported such searches.[3] Second, the "purpose" of *Steagald* was to clarify the application of the Fourth Amendment to such searches, not to provide for money damages. Finally, retro-

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direct review of a conviction and on collateral attack of a conviction that has become final. On collateral attack the principles of *Solem* v. *Stumes*, 465 U. S. 638 (1984), apply, which make it less likely that a new rule would be applied retroactively. A key factor under *Stumes* is the extent of the reliance by law enforcement authorities on the old standards. *Id.*, at 643.

[3] In *Dalia* v. *United States*, 441 U. S. 238 (1979), the Court rejected the argument that a separate search warrant was required before police could enter a business office to install an eavesdropping device when officers already had a warrant authorizing the eavesdropping itself. The Court noted that "in executing a warrant the police may find it necessary to interfere with privacy rights not explicitly considered by the judge who issued the warrant." *Id.*, at 257. In *Payton* v. *New York*, 445 U. S. 573 (1980), the Court rejected the suggestion that a separate search warrant was required before police could execute an arrest warrant by entering the home of the subject of the warrant.

active application of *Steagald* in this context would produce substantial inequitable results by imposing liability on local government units for law enforcement practices that were legitimate at the time they were undertaken. See *Griffin* v. *Illinois*, 351 U. S. 12, 26 (1956) (Frankfurter, J., concurring in judgment) ("We should not indulge in the fiction that the law now announced has always been the law . . ."). Civil liability should not attach unless there was notice that a constitutional right was at risk. *Procunier* v. *Navarette*, 434 U. S. 555, 562 (1978).

We ought to be even more wary of applying new rules of Fourth Amendment law retroactively to civil cases than we are with new rules of civil law. The primary reason for imposing § 1983 liability on local government units is deterrence, so that if there is any doubt about the constitutionality of their actions, officials will "err on the side of protecting citizens' rights." *Owen* v. *City of Independence*, 445 U. S. 622, 652 (1980). But law enforcement officials, particularly prosecutors, are in a much different position with respect to deterrence than other local government officials. Cf. *Imbler* v. *Pachtman*, 424 U. S. 409, 425 (1976). Their affirmative duty to enforce the law vigorously often requires them to take actions that legitimately intrude on individual liberties, often acting "under serious constraints of time and even information." *Ibid.* While law enforcement officials, as much as any other official, ought to "err on the side of protecting citizens' rights" when they have legitimate doubts about the constitutionality of their actions, they should not be deterred from doing their duty to enforce the criminal law when they have no such doubts. In this case, for example, Sixth Circuit law expressly authorized the Prosecutor's decision. Because a court engages in the same balancing of interests in a Fourth Amendment case that is required, with much less deliberation, of law enforcement officials, they are justified in relying on the judgment of the applicable federal court. Under these circumstances, there was nothing that should have caused the officials to "harbor doubts about the lawfulness of their intended actions," *Owen*, *supra*, at 652, and therefore nothing to deter.

Moreover, there is a significant cost to unwarranted deterrence of law enforcement officials. We recognized in *Imbler* a strong state interest in "vigorous and fearless" prosecution, and found that to be "essential to the proper functioning of the criminal justice system." 424 U. S., at 427–428. Those same general concerns apply to other law enforcement officials. Unwarranted deterrence has the undesirable effect of discouraging conduct that is essential to our justice system and protects the State's interest in public safety. In that sense, this case is different from *Owen*. It is no answer to say that some officials are entitled either to absolute or qualified immunity. It ignores reality to say that if petitioner is successful in his $20-million suit it will not have a chilling effect on law enforcement practices in Hamilton County.[4]

For these reasons, *Steagald* should not be applied retroactively. Consequently, petitioner has no constitutional violation of which to complain. I therefore would affirm the decision of the Court of Appeals.[5]

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[4] JUSTICE STEVENS misunderstands the unique posture of this case. This is not a question of retroactivity of a new civil rule to civil cases versus retroactivity of a new criminal rule to criminal cases. The special concerns discussed in the text above arise in part out of the retroactive application of a new rule of criminal law to civil cases. I see little to be gained by comparing the societal costs of civil and criminal retroactivity, see concurring opinion of STEVENS, J., *ante*, at 488–489, n. 3, because they can be severe in either case. Today's opinion could result in even a nonnegligent mistake in judgment imposing heavy liability on units of local government, especially now in view of the skyrocketing cost—or unavailability—of liability insurance. See also *Malley* v. *Briggs*, *ante*, p. 335.

[5] The Court's only response to these concerns is to note that respondent has "never challenged and has in fact also conceded that *Steagald* applied retroactively to this case. . . . We decide this case in light of respondent's concessions." *Ante*, at 477, n. 5. The retroactivity issue, however, is central to this case. We need not reach the difficult federal issues in this case if the Court correctly resolved *Steagald*'s retroactivity.

II

Even if *Steagald* is applied retroactively, petitioner has failed to demonstrate the existence of an official policy for which Hamilton County can be liable. The action said to have created policy here was nothing more than a brief response to a single question over the telephone. The Deputy Sheriffs sought instructions concerning a situation that had never occurred before, at least in the memory of the participants. *Ante*, at 474–475. That in itself, and the fact that the Assistant Prosecutor had to obtain advice from the County Prosecutor, strongly indicate that no prior policy had been formed. Petitioner therefore argues that the County Prosecutor's reaction *in this case* formed county policy. The sparse facts supporting petitioner's theory—adopted by the Court today—do not satisfy the requirement in *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 691 (1978), that local government liability under § 1983 be imposed only when the injury is caused by government policy.

A

Under *Monell*, local government units may be liable only when "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." 436 U. S., at 690. This case presents the opportunity to define further what was meant in *Monell* by "official policy." Proper resolution of the case calls for identification of the applicable principles for determining when policy is

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Nor are we prevented from doing so by any actual concession of the respondent. See Tr. of Oral Arg. 26–27. JUSTICE WHITE does not address the retroactivity of *Steagald* on the ground that the county had not relied on this contention. In my view, although we need not address this retroactivity issue, there is no question as to our right to do so—especially in view of the unfairness of holding the respondent county liable for not anticipating *Steagald*. *Procunier* v. *Navarette*, 434 U. S. 555, 559, n. 6 (1978); *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U. S. 313, 320, n. 6 (1971).

created. The Court today does not do this, but instead focuses almost exclusively on the status of the decisionmaker. Its reasoning is circular: it contends that policy is what policymakers make, and policymakers are those who have authority to make policy.

The Court variously notes that if a decision "is properly made by that government's authorized decisionmakers, it surely represents an act of official government 'policy' as that term is commonly understood," *ante*, at 481, and that "where action is directed by those who establish governmental policy, the municipality is equally responsible . . . ," *ibid.* Thus, the Court's test for determining the existence of policy focuses only on whether a decision was made "by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Ante*, at 483–484.

In my view, the question whether official policy—in any normal sense of the term—has been made in a particular case is not answered by explaining who has final authority to make policy. The question here is not "*could* the County Prosecutor make policy?" but rather, "*did* he make policy?" By focusing on the authority granted to the official under state law, the Court's test fails to answer the key federal question presented. The Court instead turns the question into one of state law. Under a test that focuses on the authority of the decisionmaker, the Court has only to look to state law for the resolution of this case. Here the Court of Appeals found that "both the County Sheriff and the County Prosecutor [had authority under Ohio law to] establish county policy under appropriate circumstances." *Ante*, at 484. Apparently that recitation of authority is all that is needed under the Court's test because no discussion is offered to demonstrate that the Sheriff or the Prosecutor actually used that authority to establish official county policy in this case.

Moreover, the Court's reasoning is inconsistent with *Monell.* Today's decision finds that policy is established because a policymaking official made a decision on the telephone that was within the scope of his authority. The Court ignores the fact that no business organization or governmental unit makes binding policy decisions so cavalierly. The Court provides no mechanism for distinguishing those acts or decisions that cannot fairly be construed to create official policy from the normal process of establishing an official policy that would be followed by a responsible public entity. Thus, the Court has adopted in part what it rejected in *Monell:* local government units are now subject to *respondeat superior* liability, at least with respect to a certain category of employees, *i. e.*, those with final authority to make policy. See *Monell*, 436 U. S., at 691; see also *Oklahoma City* v. *Tuttle*, 471 U. S. 808, 818 (1985) (rejecting theories akin to *respondeat superior*) (plurality opinion). The Court's reliance on the status of the employee carries the concept of "policy" far beyond what was envisioned in *Monell.*

B

In my view, proper resolution of the question whether official policy has been formed should focus on two factors: (i) the nature of the decision reached or the action taken, and (ii) the process by which the decision was reached or the action was taken.

Focusing on the nature of the decision distinguishes between policies and mere ad hoc decisions. Such a focus also reflects the fact that most policies embody a rule of general applicability. That is the tenor of the Court's statement in *Monell* that local government units are liable under § 1983 when the action that is alleged to be unconstitutional "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." 436 U. S., at 690. The clear implication is that policy is created when a rule is formed that applies to all similar situations—a "governing principle [or] plan." Webster's New Twentieth Century Dictionary 1392 (2d ed. 1979).[6] When a rule of general applicability has been approved, the government has taken a position for which it can be held responsible.[7]

Another factor indicating that policy has been formed is the process by which the decision at issue was reached. Formal procedures that involve, for example, voting by elected officials, prepared reports, extended deliberation, or official records indicate that the resulting decisions taken "may fairly be said to represent official policy," *Monell*, *supra*, at 694. *Owen* v. *City of Independence*, 445 U. S. 622 (1980), provides an example. The City Council met in a regularly scheduled meeting. One member of the Council made a motion to release to the press certain reports that cast an employee in a bad light. After deliberation, the Council passed the motion with no dissents and one abstention. *Id.*, at 627–629. Although this official action did not establish a rule of general applicability, it is clear that policy was formed because of the process by which the decision was reached.

Applying these factors to the instant case demonstrates that no official policy was formulated. Certainly, no rule of general applicability was adopted. The Court correctly notes that the Sheriff "testified that the Department had no written policy respecting the serving of capiases on the property of third persons and that the proper response in any given situation would depend upon the circumstances." *Ante*, at 474. Nor could he recall a specific instance in which entrance had been denied and forcibly gained. The Court's result today rests on the implicit conclusion that the Prosecutor's response—"go in and get them"—altered the prior case-by-case approach of the Department and formed a new rule to apply in all similar cases. Nothing about the Prosecutor's response to the inquiry over the phone, nor the circumstances surrounding the response, indicates that such a rule of general applicability was formed.[8]

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[6] The focus on a rule of general applicability does not mean that more than one instance of its application is required. The local government unit may be liable for the first application of a duly constituted unconstitutional policy.

[7] An example of official policy in the form of a rule of general applicability is *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247 (1981). While the Court in that case was not called on to define the scope of the word "policy," the complaint was based on a rule of general applicability. The city canceled a scheduled concert pursuant to its rule of not allowing rock concerts. Plaintiffs alleged that the general rule against rock concerts violated their First Amendment rights. Even if the cancellation was the first implementation of the rule, it was clear that the city had committed itself to a general position that would govern future cases.

Similarly, nothing about the way the decision was reached indicates that official policy was formed. The prosecutor, without time for thoughtful consideration or consultation, simply gave an off-the-cuff answer to a single question. There was no *process* at all. The Court's holding undercuts the basic rationale of *Monell*, and unfairly increases the risk of liability on the level of government least able to bear it. I dissent.

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[8] There is nothing in the record to support the inference relied on by JUSTICES WHITE and O'CONNOR. Nor has this Court ever held that because a policy has been adopted by one city or county we may *assume* that a similar policy has been adopted by neighboring cities or counties. After all, the city and county in this case are separate governmental entities.

Moreover, and again contrary to the views of my colleagues, this Court has never held—at least to my knowledge—that we may assume that simply because certain conduct is permitted by existing law, it must have been adopted as county policy. The undisputed facts in this case refute these *assumptions* by JUSTICES WHITE and O'CONNOR. Neither the Sheriffs who had been denied entry nor the Assistant County Prosecutor knew of any such policy. Otherwise, one of the Sheriffs would not have called the Prosecutor's office, and certainly the Assistant Prosecutor would not have thought it necessary to put the question to the Prosecutor. Nor did the Prosecutor, when asked, say that the county's policy was to force an entry when necessary to serve a valid arrest warrant. Rather, he simply said "go in and get them"—the sort of spontaneous reply that a busy official might make quite thoughtlessly. As noted above, the Sheriff testified that the proper response would depend on the circumstances.

GOLDMAN *v.* WEINBERGER, SECRETARY OF DEFENSE, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-1097. Argued January 14, 1986—Decided March 25, 1986

Petitioner, an Orthodox Jew and ordained rabbi, was ordered not to wear a yarmulke while on duty and in uniform as a commissioned officer in the Air Force at March Air Force Base, pursuant to an Air Force regulation that provides that authorized headgear may be worn out of doors but that indoors "[h]eadgear [may] not be worn . . . except by armed security police in the performance of their duties." Petitioner then brought an action in Federal District Court, claiming that the application of the regulation to prevent him from wearing his yarmulke infringed upon his First Amendment freedom to exercise his religious beliefs. The District Court permanently enjoined the Air Force from enforcing the regulation against petitioner. The Court of Appeals reversed.

Held: The First Amendment does not prohibit the challenged regulation from being applied to petitioner even though its effect is to restrict the wearing of the headgear required by his religious beliefs. That Amendment does not require the military to accommodate such practices as wearing a yarmulke in the face of its view that they would detract from the uniformity sought by dress regulations. Here, the Air Force has drawn the line essentially between religious apparel that is visible and that which is not, and the challenged regulation reasonably and evenhandedly regulates dress in the interest of the military's perceived need for uniformity. Pp. 506–510.

236 U. S. App. D. C. 248, 734 F. 2d 1531, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion, in which WHITE and POWELL, JJ., joined, *post,* p. 510. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post,* p. 513. BLACKMUN, J., filed a dissenting opinion, *post,* p. 524. O'CONNOR, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post,* p. 528.

Nathan Lewin argued the cause for petitioner. With him on the brief were *David J. Butler* and *Dennis Rapps.*

Kathryn A. Oberly argued the cause for respondents. With her on the brief were *Solicitor General Fried, Assistant Attorney General Willard, Deputy Solicitor General Geller,* and *Anthony J. Steinmeyer.**

JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner S. Simcha Goldman contends that the Free Exercise Clause of the First Amendment to the United States Constitution permits him to wear a yarmulke while in uniform, notwithstanding an Air Force regulation mandating uniform dress for Air Force personnel. The District Court for the District of Columbia permanently enjoined the Air Force from enforcing its regulation against petitioner and from penalizing him for wearing his yarmulke. The Court of Appeals for the District of Columbia Circuit reversed on the ground that the Air Force's strong interest in discipline justified the strict enforcement of its uniform dress requirements. We granted certiorari because of the importance of the question, 472 U. S. 1016 (1985), and now affirm.

Petitioner Goldman is an Orthodox Jew and ordained rabbi. In 1973, he was accepted into the Armed Forces Health Professions Scholarship Program and placed on inactive reserve status in the Air Force while he studied clinical psychology at Loyola University of Chicago. During his three years in the scholarship program, he received a monthly stipend and an allowance for tuition, books, and fees. After completing his Ph.D. in psychology, petitioner

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*Briefs of *amici curiae* urging reversal were filed for the American Jewish Committee et al. by *Samuel Eric Hans Ericsson, Kimberlee Wood Colby, Samuel Rabinove,* and *Richard T. Foltin;* for the American Jewish Congress et al. by *Ronald A. Krauss* and *Marc D. Stern;* for the Anti-Defamation League of B'nai B'rith by *Daniel P. Levitt, Justin J. Finger,* and *Jeffrey P. Sinensky;* and for the Catholic League for Religious and Civil Rights by *Steven Frederick McDowell.*

W. Charles Bundren, Guy O. Farley, Jr., John W. Whitehead, Thomas O. Kotouc, Wendell R. Bird, and *William B. Hollberg* filed a brief for the Rutherford Institute et al. as *amici curiae.*

entered active service in the United States Air Force as a commissioned officer, in accordance with a requirement that participants in the scholarship program serve one year of active duty for each year of subsidized education. Petitioner was stationed at March Air Force Base in Riverside, California, and served as a clinical psychologist at the mental health clinic on the base.

Until 1981, petitioner was not prevented from wearing his yarmulke on the base. He avoided controversy by remaining close to his duty station in the health clinic and by wearing his service cap over the yarmulke when out of doors. But in April 1981, after he testified as a defense witness at a court-martial wearing his yarmulke but not his service cap, opposing counsel lodged a complaint with Colonel Joseph Gregory, the Hospital Commander, arguing that petitioner's practice of wearing his yarmulke was a violation of Air Force Regulation (AFR) 35–10. This regulation states in pertinent part that "[h]eadgear will not be worn . . . [w]hile indoors except by armed security police in the performance of their duties." AFR 35–10, ¶1–6.h(2)(f) (1980).

Colonel Gregory informed petitioner that wearing a yarmulke while on duty does indeed violate AFR 35–10, and ordered him not to violate this regulation outside the hospital. Although virtually all of petitioner's time on the base was spent in the hospital, he refused. Later, after petitioner's attorney protested to the Air Force General Counsel, Colonel Gregory revised his order to prohibit petitioner from wearing the yarmulke even in the hospital. Petitioner's request to report for duty in civilian clothing pending legal resolution of the issue was denied. The next day he received a formal letter of reprimand, and was warned that failure to obey AFR 35–10 could subject him to a court-martial. Colonel Gregory also withdrew a recommendation that petitioner's application to extend the term of his active service be approved, and substituted a negative recommendation.

Petitioner then sued respondent Secretary of Defense and others, claiming that the application of AFR 35–10 to prevent him from wearing his yarmulke infringed upon his First Amendment freedom to exercise his religious beliefs. The United States District Court for the District of Columbia preliminarily enjoined the enforcement of the regulation, *Goldman* v. *Secretary of Defense*, 530 F. Supp. 12 (1981), and then after a full hearing permanently enjoined the Air Force from prohibiting petitioner from wearing a yarmulke while in uniform. *Goldman* v. *Secretary of Defense*, 29 EPD ¶32, 753 (1982). Respondents appealed to the Court of Appeals for the District of Columbia Circuit, which reversed. *Goldman* v. *Secretary of Defense*, 236 U. S. App. D. C. 248, 734 F. 2d 1531 (1984). As an initial matter, the Court of Appeals determined that the appropriate level of scrutiny of a military regulation that clashes with a constitutional right is neither strict scrutiny nor rational basis. *Id.*, at 252, 734 F. 2d, at 1535–1536. Instead, it held that a military regulation must be examined to determine whether "legitimate military ends are sought to be achieved," *id.*, at 253, 734 F. 2d, at 1536, and whether it is "designed to accommodate the individual right to an appropriate degree." *Ibid.* Applying this test, the court concluded that "the Air Force's interest in uniformity renders the strict enforcement of its regulation permissible." *Id.*, at 257, 734 F. 2d, at 1540. The full Court of Appeals denied a petition for rehearing en banc, with three judges dissenting. 238 U. S. App. D. C. 267, 739 F. 2d 657 (1984).

Petitioner argues that AFR 35–10, as applied to him, prohibits religiously motivated conduct and should therefore be analyzed under the standard enunciated in *Sherbert* v. *Verner*, 374 U. S. 398, 406 (1963). See also *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707 (1981); *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972). But we have repeatedly held that "the military is, by necessity, a specialized society separate from civilian society."

Parker v. *Levy*, 417 U. S. 733, 743 (1974). See also *Chappell* v. *Wallace*, 462 U. S. 296, 300 (1983); *Schlesinger* v. *Councilman*, 420 U. S. 738, 757 (1975); *Orloff* v. *Willoughby*, 345 U. S. 83, 94 (1953). "[T]he military must insist upon a respect for duty and a discipline without counterpart in civilian life," *Schlesinger* v. *Councilman*, *supra*, at 757, in order to prepare for and perform its vital role. See also *Brown* v. *Glines*, 444 U. S. 348, 354 (1980).

Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society. The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps. See, *e. g.*, *Chappell* v. *Wallace*, *supra*, at 300; *Greer* v. *Spock*, 424 U. S. 828, 843–844 (1976) (POWELL, J., concurring); *Parker* v. *Levy*, *supra*, at 744. The essence of military service "is the subordination of the desires and interests of the individual to the needs of the service." *Orloff* v. *Willoughby*, *supra*, at 92.

These aspects of military life do not, of course, render entirely nugatory in the military context the guarantees of the First Amendment. See, *e. g.*, *Chappell* v. *Wallace*, *supra*, at 304. But "within the military community there is simply not the same [individual] autonomy as there is in the larger civilian community." *Parker* v. *Levy*, *supra*, at 751. In the context of the present case, when evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest. See *Chappell* v. *Wallace*, *supra*, at 305; *Orloff* v. *Willoughby*, *supra*, 93–94. Not only are courts "'ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have,'" *Chappell* v. *Wallace*, *supra*, at 305, quoting Warren, The Bill of Rights and the Military, 37 N. Y. U. L. Rev. 181, 187 (1962), but the military authorities have been charged by the Executive and Legislative Branches with carrying out our Nation's military policy. "[J]udicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." *Rostker* v. *Goldberg*, 453 U. S. 57, 70 (1981).

The considered professional judgment of the Air Force is that the traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission. Uniforms encourage a sense of hierarchical unity by tending to eliminate outward individual distinctions except for those of rank. The Air Force considers them as vital during peacetime as during war because its personnel must be ready to provide an effective defense on a moment's notice; the necessary habits of discipline and unity must be developed in advance of trouble. We have acknowledged that "[t]he inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection." *Chappell* v. *Wallace*, *supra*, at 300.

To this end, the Air Force promulgated AFR 35-10, a 190-page document, which states that "Air Force members will wear the Air Force uniform while performing their military duties, except when authorized to wear civilian clothes on duty." AFR 35-10, ¶1-6 (1980). The rest of the document describes in minute detail all of the various items of apparel that must be worn as part of the Air Force uniform. It authorizes a few individualized options with respect to certain pieces of jewelry and hairstyle, but even these are subject to severe limitations. See AFR 35-10, Table 1-1, and ¶1-12.b(1)(b) (1980). In general, authorized headgear may be worn only out of doors. See AFR 35–10, ¶1–6.h (1980). Indoors, "[h]eadgear [may] not be worn . . . except by armed security police in the performance of their duties." AFR 35–10, ¶1–6.h(2)(f) (1980). A narrow exception to this rule exists for headgear worn during indoor religious ceremonies. See AFR 35–10, ¶1–6.h(2)(d) (1980). In addition, military commanders may in their discretion permit visible religious headgear and other such apparel in designated living quarters and nonvisible items generally. See Department of Defense Directive 1300.17 (June 18, 1985).

Petitioner Goldman contends that the Free Exercise Clause of the First Amendment requires the Air Force to make an exception to its uniform dress requirements for religious apparel unless the accouterments create a "clear danger" of undermining discipline and esprit de corps. He asserts that in general, visible but "unobtrusive" apparel will not create such a danger and must therefore be accommodated. He argues that the Air Force failed to prove that a specific exception for his practice of wearing an unobtrusive yarmulke would threaten discipline. He contends that the Air Force's assertion to the contrary is mere *ipse dixit*, with no support from actual experience or a scientific study in the record, and is contradicted by expert testimony that religious exceptions to AFR 35–10 are in fact desirable and will increase morale by making the Air Force a more humane place.

But whether or not expert witnesses may feel that religious exceptions to AFR 35–10 are desirable is quite beside the point. The desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment. Quite obviously, to the extent the regulations do not permit the wearing of religious apparel such as a yarmulke, a practice described by petitioner as silent devotion akin to prayer, military life may be more objectionable for petitioner and probably others. But the First Amendment does not require the military to accommodate such practices in the face of its view that they would detract from the uniformity sought by the dress regulations. The Air Force has drawn the line essentially between religious apparel that is visible and that which is not, and we hold that those portions of the regulations challenged here reasonably and evenhandedly regulate dress in the interest of the military's perceived need for uniformity. The First Amendment therefore does not prohibit them from being applied to petitioner even though their effect is to restrict the wearing of the headgear required by his religious beliefs.

The judgment of the Court of Appeals is

Affirmed.

JUSTICE STEVENS, with whom JUSTICE WHITE and JUSTICE POWELL join, concurring.

Captain Goldman presents an especially attractive case for an exception from the uniform regulations that are applicable to all other Air Force personnel. His devotion to his faith is readily apparent. The yarmulke is a familiar and accepted sight.[1] In addition to its religious significance for the wearer, the yarmulke may evoke the deepest respect and admiration—the symbol of a distinguished tradition[2] and an eloquent rebuke to the ugliness of anti-Semitism.[3] Captain Goldman's military duties are performed in a setting in which a modest departure from the uniform regulation creates almost no danger of impairment of the Air Force's military mission. Moreover, on the record before us, there is reason to believe that the policy of strict enforcement against Captain Goldman had a retaliatory motive—he had worn his yarmulke while testifying on behalf of a defendant in a court-martial proceeding.[4] Nevertheless, as the case has been argued,[5]

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[1] Captain Goldman states in his brief:

"Yarmulkes are generally understood to be a form of religious observance. They are commonly seen and accepted in today's society wherever Orthodox Jews are found. University campuses—particularly on the East Coast—have substantial numbers of young men who wear yarmulkes. On the streets of New York City, Los Angeles, Chicago, or Miami, yarmulkes are commonplace. They are increasingly visible in centers of commerce, including retail businesses, brokerage houses, and stock exchanges. Attorneys wearing yarmulkes can be found in the state and federal courthouses of New York, and attorneys wearing yarmulkes have been permitted to sit in the Bar Section of this Court and attend oral arguments." Brief for Petitioner 11.

[2] In dissenting from the Court of Appeals' denial of rehearing en banc, Judge Starr was moved to describe the yarmulke as the "symbol of [a] faith whose roots are as deep and venerable as Western civilization itself" and the "symbol of a great faith from which Western morality and the Judaeo-

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Christian tradition have arisen." 238 U. S. App. D. C. 267, 268, 739 F. 2d 657, 658 (1984).

[3] Cf. N. Belth, A Promise to Keep (1979) (recounting history of anti-Semitism in the United States). The history of intolerance in our own country can be glimpsed by reviewing Justice Story's observation that the purpose of the First Amendment was "not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects," 2 J. Story, Commentaries on the Constitution of the United States § 1877, p. 594 (1851)—a view that the Court has, of course, explicitly rejected. See *Wallace* v. *Jaffree*, 472 U. S. 38, 52–55 (1985).

[4] Before the testimony at the court-martial that provoked this confrontation, Captain Goldman had received extremely high ratings in his performance evaluations. App. 214–225. Indeed, one of the evaluators noted: "He maintains appropriate military dress and bearing." *Id.*, at 217. Although the Air Force stated that an officer had received one or two complaints about Captain Goldman's wearing of the yarmulke, *id.*, at 15, 22, no complaint was acted upon until the court-martial incident. See *Goldman* v. *Secretary of Defense*, 29 EPD ¶ 32,753, p. 25,539 (1982) (District Court finding that, until the court-martial, "no objection was raised to Goldman's wearing his yarmulke while in uniform").

[5] Captain Goldman has mounted a broad challenge to the prohibition on visible religious wear as it applies to yarmulkes. He has not argued the far narrower ground that, even if the general prohibition is valid, its application in his case was retaliatory and impermissible. See, *e. g.*, Brief for Petitioner i (stating the Question Presented as "Whether the Air Force may constitutionally prohibit an Orthodox Jewish psychologist from wearing a 'yarmulke'—an unobtrusive skullcap which is part of his religious observance—while he is in uniform on duty at a military hospital"); *id.*, at 8 ("The Air Force's asserted grounds for barring yarmulkes are patently unsound. . . . Indeed the symbolic significance of our Nation's military

I believe we must test the validity of the Air Force's rule not merely as it applies to Captain Goldman but also as it applies to all service personnel who have sincere religious beliefs that may conflict with one or more military commands.

JUSTICE BRENNAN is unmoved by the Government's concern that "while a yarmulke might not seem obtrusive to a Jew, neither does a turban to a Sikh, a saffron robe to a Satchidananda Ashram-Integral Yogi, nor do dreadlocks to a Rastafarian." *Post,* at 519. He correctly points out that "turbans, saffron robes, and dreadlocks are not before us in this case," and then suggests that other cases may be fairly decided by reference to a reasonable standard based on "functional utility, health and safety considerations, and the goal of a polished, professional appearance." *Ibid.* As the Court has explained, this approach attaches no weight to the separate interest in uniformity itself. Because professionals in the military service attach great importance to that plausible interest, it is one that we must recognize as legitimate and rational even though personal experience or admiration for the performance of the "rag-tag band of soldiers" that won us our freedom in the Revolutionary War might persuade us that the Government has exaggerated the importance of that interest.

The interest in uniformity, however, has a dimension that is of still greater importance for me. It is the interest in uniform treatment for the members of all religious faiths. The very strength of Captain Goldman's claim creates the danger that a similar claim on behalf of a Sikh or a Rastafarian might readily be dismissed as "so extreme, so unusual, or so faddish an image that public confidence in his ability to perform his duties will be destroyed." *Post,* at 518. If exceptions from dress code regulations are to be granted on the basis of a multifactored test such as that proposed by JUSTICE BRENNAN, inevitably the decisionmaker's evaluation of the charac-

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services and the educational role of the military in teaching the young defenders of our country the principles of liberty require acceptance of petitioner's religious observance").

ter and the sincerity of the requester's faith—as well as the probable reaction of the majority to the favored treatment of a member of that faith—will play a critical part in the decision. For the difference between a turban or a dreadlock on the one hand, and a yarmulke on the other, is not merely a difference in "appearance"—it is also the difference between a Sikh or a Rastafarian, on the one hand, and an Orthodox Jew on the other. The Air Force has no business drawing distinctions between such persons when it is enforcing commands of universal application.[6]

As the Court demonstrates, the rule that is challenged in this case is based on a neutral, completely objective standard—visibility. It was not motivated by hostility against, or any special respect for, any religious faith. An exception for yarmulkes would represent a fundamental departure from the true principle of uniformity that supports that rule. For that reason, I join the Court's opinion and its judgment.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Simcha Goldman invokes this Court's protection of his First Amendment right to fulfill one of the traditional religious obligations of a male Orthodox Jew—to cover his head before an omnipresent God. The Court's response to Goldman's request is to abdicate its role as principal expositor of the Constitution and protector of individual liberties in favor of credulous deference to unsupported assertions of military necessity. I dissent.

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[6] See *United States* v. *Lee*, 455 U. S. 252, 263, n. 2 (1982) (STEVENS, J., concurring in judgment) ("In my opinion, the principal reason for adopting a strong presumption against such claims is not a matter of administrative convenience. It is the overriding interest in keeping the government—whether it be the legislature or the courts—out of the business of evaluating the relative merits of differing religious claims"). Cf. *Wallace* v. *Jaffree*, 472 U. S., at 60 (referring to "the established principle that the government must pursue a course of complete neutrality toward religion"); *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 792–793 (1973) ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion"); *Abington School District* v. *Schempp*, 374 U. S. 203, 226 (1963) ("In the relationship between man and religion, the State is firmly committed to a position of neutrality").

I

In ruling that the paramount interests of the Air Force override Dr. Goldman's free exercise claim, the Court overlooks the sincere and serious nature of his constitutional claim. It suggests that the desirability of certain dress regulations, rather than a First Amendment right, is at issue. The Court declares that in selecting dress regulations, "military officials . . . are under no constitutional mandate to abandon their considered professional judgment." *Ante*, at 509. If Dr. Goldman wanted to wear a hat to keep his head warm or to cover a bald spot I would join the majority. Mere personal preferences in dress are not constitutionally protected. The First Amendment, however, restrains the Government's ability to prevent an Orthodox Jewish serviceman from, or punish him for, wearing a yarmulke.[1]

The Court also attempts, unsuccessfully, to minimize the burden that was placed on Dr. Goldman's rights. The fact that "the regulations do not permit the wearing of . . . a yarmulke," does not simply render military life for observant Orthodox Jews "objectionable." *Ibid.* It sets up an almost absolute bar to the fulfillment of a religious duty. Dr. Goldman spent most of his time in uniform indoors, where the dress code forbade him even to cover his head with his service cap. Consequently, he was asked to violate the tenets of his faith virtually every minute of every workday.

II

A

Dr. Goldman has asserted a substantial First Amendment claim, which is entitled to meaningful review by this Court.

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[1] The yarmulke worn by Dr. Goldman was a dark-colored skullcap measuring approximately $5\frac{1}{2}$ inches in diameter. Brief for Petitioner 3.

The Court, however, evades its responsibility by eliminating, in all but name only, judicial review of military regulations that interfere with the fundamental constitutional rights of service personnel.

Our cases have acknowledged that in order to protect our treasured liberties, the military must be able to command service members to sacrifice a great many of the individual freedoms they enjoyed in the civilian community and to endure certain limitations on the freedoms they retain. See, *e. g.*, *Brown* v. *Glines*, 444 U. S. 348, 354–357 (1980); *Greer* v. *Spock*, 424 U. S. 828, 848 (1976) (POWELL, J., concurring); *Parker* v. *Levy*, 417 U. S. 733, 743–744, 751 (1974). Notwithstanding this acknowledgment, we have steadfastly maintained that " 'our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.' " *Chappell* v. *Wallace*, 462 U. S. 296, 304 (1983) (quoting Warren, The Bill of Rights and the Military, 37 N. Y. U. L. Rev. 181, 188 (1962)); see also, *Glines*, *supra*, at 354. And, while we have hesitated, due to our lack of expertise concerning military affairs and our respect for the delegated authority of a coordinate branch, to strike down restrictions on individual liberties which could reasonably be justified as necessary to the military's vital function, see, *e. g.*, *Rostker* v. *Goldberg*, 453 U. S. 57, 66–67 (1981) (citing cases), we have never abdicated our obligation of judicial review. See, *e. g.*, *id.*, at 67.

Today the Court eschews its constitutionally mandated role. It adopts for review of military decisions affecting First Amendment rights a subrational-basis standard—absolute, uncritical "deference to the professional judgment of military authorities." *Ante*, at 507. If a branch of the military declares one of its rules sufficiently important to outweigh a service person's constitutional rights, it seems that the Court will accept that conclusion, no matter how absurd or unsupported it may be.

A deferential standard of review, however, need not, and should not, mean that the Court must credit arguments that defy common sense. When a military service burdens the free exercise rights of its members in the name of necessity, it must provide, as an initial matter and at a minimum, a *credible* explanation of how the contested practice is likely to interfere with the proffered military interest.[2] Unabashed *ipse dixit* cannot outweigh a constitutional right.

In the present case, the Air Force asserts that its interests in discipline and uniformity would be undermined by an exception to the dress code permitting observant male Orthodox Jews to wear yarmulkes. The Court simply restates these assertions without offering any explanation how the exception Dr. Goldman requests reasonably could interfere with the Air Force's interests. Had the Court given actual consideration to Goldman's claim, it would have been compelled to decide in his favor.

B

1

The Government maintains in its brief that discipline is jeopardized whenever exceptions to military regulations are granted. Service personnel must be trained to obey even the most arbitrary command reflexively. Non-Jewish personnel will perceive the wearing of a yarmulke by an Orthodox Jew as an unauthorized departure from the rules and will begin to question the principle of unswerving obedience. Thus shall our fighting forces slip down the treacherous slope toward unkempt appearance, anarchy, and, ultimately, defeat at the hands of our enemies.

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[2] I continue to believe that Government restraints on First Amendment rights, including limitations placed on military personnel, may be justified only upon showing a compelling state interest which is precisely furthered by a narrowly tailored regulation. See, *e. g.*, *Brown* v. *Glines*, 444 U. S. 348, 367 (1980) (BRENNAN, J., dissenting). I think that any special needs of the military can be accommodated in the compelling-interest prong of the test. My point here is simply that even under a more deferential test Dr. Goldman should prevail.

The contention that the discipline of the Armed Forces will be subverted if Orthodox Jews are allowed to wear yarmulkes with their uniforms surpasses belief. It lacks support in the record of this case, and the Air Force offers no basis for it as a general proposition. While the perilous slope permits the services arbitrarily to refuse exceptions requested to satisfy mere personal preferences, before the Air Force may burden free exercise rights it must advance, at the *very least*, a rational reason for doing so.

Furthermore, the Air Force cannot logically defend the content of its rule by insisting that discipline depends upon absolute adherence to whatever rule is established. If, as General Usher admitted at trial, App. 52, the dress code codified religious exemptions from the "no-headgear-indoors" regulation, then the wearing of a yarmulke would be sanctioned by the code and could not be considered an unauthorized deviation from the rules.

2

The Government also argues that the services have an important interest in uniform dress, because such dress establishes the preeminence of group identity, thus fostering esprit de corps and loyalty to the service that transcends individual bonds. In its brief, the Government characterizes the yarmulke as an assertion of individuality and as a badge of religious and ethnic identity, strongly suggesting that, as such, it could drive a wedge of divisiveness between members of the services.

First, the purported interests of the Air Force in complete uniformity of dress and in elimination of individuality or visible identification with any group other than itself are belied by the service's own regulations. The dress code expressly abjures the need for total uniformity:

> "(1) The American public and its elected representatives draw certain conclusions on military effectiveness based on what they see; that is, the image the Air Force presents. The image must instill public confidence and leave no doubt that the service member lives by a common standard and responds to military order and discipline.
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> "(2) Appearance in uniform is an important part of this image. . . . Neither the Air Force nor the public expects absolute uniformity of appearance. Each member has the right, within limits, to express individuality through his or her appearance. However, the image of a disciplined service member who can be relied on to do his or her job excludes the extreme, the unusual, and the fad." AFR 35-10, ¶¶1-12a(1) and (2) (1978).[3]

It cannot be seriously contended that a serviceman in a yarmulke presents so extreme, so unusual, or so faddish an image that public confidence in his ability to perform his duties will be destroyed. Under the Air Force's own standards, then, Dr. Goldman should have and could have been granted an exception to wear his yarmulke.

The dress code also allows men to wear up to three rings and one identification bracelet of "neat and conservative," but nonuniform, design. AFR 35-10, ¶1-12b(1)(b) (1978). This jewelry is apparently permitted even if, as is often the case with rings, it associates the wearer with a denominational school or a religious or secular fraternal organization. If these emblems of religious, social, and ethnic identity are not deemed to be unacceptably divisive, the Air Force cannot rationally justify its bar against yarmulkes on that basis.

Moreover, the services allow, and rightly so, other manifestations of religious diversity. It is clear to all service personnel that some members attend Jewish services, some

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[3] The 1978 and 1980 editions of AFR 35-10 governed, sequentially, the Air Force dress code during Dr. Goldman's period of service. The two editions are substantially identical in all respects relevant to this case.

Christian, some Islamic, and some yet other religious services. Barracks mates see Mormons wearing temple garments, Orthodox Jews wearing tzitzit, and Catholics wearing crosses and scapulars. That they come from different faiths and ethnic backgrounds is not a secret that can or should be kept from them.

I find totally implausible the suggestion that the overarching group identity of the Air Force would be threatened if Orthodox Jews were allowed to wear yarmulkes with their uniforms. To the contrary, a yarmulke worn with a United States military uniform is an eloquent reminder that the shared and proud identity of United States serviceman embraces and unites religious and ethnic pluralism.

Finally, the Air Force argues that while Dr. Goldman describes his yarmulke as an "unobtrusive" addition to his uniform, obtrusiveness is a purely relative, standardless judgment. The Government notes that while a yarmulke might not seem obtrusive to a Jew, neither does a turban to a Sikh, a saffron robe to a Satchidananda Ashram-Integral Yogi, nor dreadlocks to a Rastafarian. If the Court were to require the Air Force to permit yarmulkes, the service must also allow all of these other forms of dress and grooming.

The Government dangles before the Court a classic parade of horribles, the specter of a brightly-colored, "rag-tag band of soldiers." Brief for Respondents 20. Although turbans, saffron robes, and dreadlocks are not before us in this case and must each be evaluated against the reasons a service branch offers for prohibiting personnel from wearing them while in uniform, a reviewing court could legitimately give deference to dress and grooming rules that have a *reasoned* basis in, for example, functional utility, health and safety considerations, and the goal of a polished, professional appearance.[4] AFR 35–10, ¶¶1–12a and 1–12a(1) (1978)

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[4] For example, the Air Force could no doubt justify regulations ordering troops to wear uniforms, prohibiting garments that could become entan-

(identifying neatness, cleanliness, safety, and military image as the four elements of the dress code's "high standard of dress and personal appearance"). It is the lack of any reasoned basis for prohibiting yarmulkes that is so striking here.

Furthermore, contrary to its intimations, the Air Force has available to it a familiar standard for determining whether a particular style of yarmulke is consistent with a polished, professional military appearance—the "neat and conservative" standard by which the service judges jewelry. AFR 35-10, ¶1-12b(1)(b) (1978). No rational reason exists why yarmulkes cannot be judged by the same criterion. Indeed, at argument Dr. Goldman declared himself willing to wear whatever style and color yarmulke the Air Force believes best comports with its uniform. Tr. 18.

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Department of Defense Directive 1300.17 (June 18, 1985) grants commanding officers the discretion to permit service personnel to wear religious items and apparel that are not visible with the uniform, such as crosses, temple garments, and scapulars. JUSTICE STEVENS favors this "visibility test" because he believes that it does not involve the Air Force in drawing distinctions among faiths. *Ante*, at 512-513. He rejects functional utility, health, and safety considerations, and similar grounds as criteria for religious exceptions to the dress code, because he fears that these standards will allow some servicepersons to satisfy their religious dress and grooming obligations, while preventing others from fulfilling theirs. *Ibid.* But, the visible/not visible standard has that same effect. Furthermore, it restricts the free exercise rights of a larger number of servicepersons. The visibility test permits *only* individuals whose outer garments and grooming are indistinguishable from those of mainstream Christians to fulfill their religious duties. In my view, the

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gled in machinery, and requiring hair to be worn short so that it may not be grabbed in combat and may be kept louse-free in field conditions.

Constitution requires the selection of criteria that permit the greatest possible number of persons to practice their faiths freely.

Implicit in JUSTICE STEVENS' concurrence, and in the Government's arguments, is what might be characterized as a fairness concern. It would be unfair to allow Orthodox Jews to wear yarmulkes, while prohibiting members of other minority faiths with visible dress and grooming requirements from wearing their saffron robes, dreadlocks, turbans, and so forth. While I appreciate and share this concern for the feelings and the free exercise rights of members of these other faiths, I am baffled by this formulation of the problem. What puzzles me is the implication that a neutral standard that could result in the disparate treatment of Orthodox Jews and, for example, Sikhs is *more* troublesome or unfair than the existing neutral standard that does result in the different treatment of Christians, on the one hand, and Orthodox Jews and Sikhs on the other. *Both* standards are constitutionally suspect; before either can be sustained, it must be shown to be a narrowly tailored means of promoting important military interests.

I am also perplexed by the related notion that for purposes of constitutional analysis religious faiths may be divided into two categories—those with visible dress and grooming requirements and those without. This dual category approach seems to incorporate an assumption that fairness, the First Amendment, and, perhaps, equal protection, require all faiths belonging to the same category to be treated alike, but permit a faith in one category to be treated differently from a faith belonging to the other category. The practical effect of this categorization is that, under the guise of neutrality and evenhandedness, majority religions are favored over distinctive minority faiths. This dual category analysis is fundamentally flawed and leads to a result that the First Amendment was intended to prevent. Under the Constitution there is only *one* relevant category—*all* faiths. Burdens placed on the free exercise rights of members of one faith must be justified independently of burdens placed on the rights of members of another religion. It is not enough to say that Jews cannot wear yarmulkes simply because Rastafarians might not be able to wear dreadlocks.

Unless the visible/not visible standard for evaluating requests for religious exceptions to the dress code promotes a significant military interest, it is constitutionally impermissible. JUSTICE STEVENS believes that this standard advances an interest in the "uniform treatment" of all religions. *Ante*, at 512. As I have shown, that uniformity is illusory, unless uniformity means uniformly accommodating majority religious practices and uniformly rejecting distinctive minority practices. But, more directly, Government agencies are not free to define their own interests in uniform treatment of different faiths. That function has been assigned to the First Amendment. The First Amendment requires that burdens on free exercise rights be justified by independent and important interests that promote the function of the agency. See, *e. g.*, *United States* v. *Lee*, 455 U. S. 252, 257–258 (1982); *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707 (1981); *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972); *Sherbert* v. *Verner*, 374 U. S. 398 (1963). The only independent military interest furthered by the visibility standard is uniformity of dress. And, that interest, as I demonstrated in Part II–B (2), *supra*, does not support a prohibition against yarmulkes.

The Air Force has failed utterly to furnish a credible explanation why an exception to the dress code permitting Orthodox Jews to wear neat and conservative yarmulkes while in uniform is likely to interfere with its interest in discipline and uniformity. We cannot "distort the Constitution to approve all that the military may deem expedient." *Korematsu* v. *United States*, 323 U. S. 214, 244 (1944) (Jackson, J., dissenting). Under any meaningful level of judicial review, Simcha Goldman should prevail.

III

Through our Bill of Rights, we pledged ourselves to attain a level of human freedom and dignity that had no parallel in history. Our constitutional commitment to religious freedom and to acceptance of religious pluralism is one of our greatest achievements in that noble endeavor. Almost 200 years after the First Amendment was drafted, tolerance and respect for all religions still set us apart from most other countries and draws to our shores refugees from religious persecution from around the world.

Guardianship of this precious liberty is not the exclusive domain of federal courts. It is the responsibility as well of the States and of the other branches of the Federal Government. Our military services have a distinguished record of providing for many of the religious needs of their personnel. But that they have satisfied much of their constitutional obligation does not remove their actions from judicial scrutiny. Our Nation has preserved freedom of religion, not through trusting to the good faith of individual agencies of government alone, but through the constitutionally mandated vigilant oversight and checking authority of the judiciary.

It is not the province of the federal courts to second-guess the professional judgments of the military services, but we are bound by the Constitution to assure ourselves that there exists a rational foundation for assertions of military necessity when they interfere with the free exercise of religion. "The concept of military necessity is seductively broad," *Glines*, 444 U. S., at 369 (BRENNAN, J., dissenting), and military decisionmakers themselves are as likely to succumb to its allure as are the courts and the general public. Definitions of necessity are influenced by decisionmakers' experiences and values. As a consequence, in pluralistic societies such as ours, institutions dominated by a majority are inevitably, if inadvertently, insensitive to the needs and values of minorities when these needs and values differ from those of the majority. The military, with its strong ethic of conformity and unquestioning obedience, may be particularly impervious to minority needs and values. A critical function of the Religion Clauses of the First Amendment is to protect the rights of members of minority religions against quiet erosion by majoritarian social institutions that dismiss minority beliefs and practices as unimportant, because unfamiliar. It is the constitutional role of this Court to ensure that this purpose of the First Amendment be realized.

The Court and the military services[5] have presented patriotic Orthodox Jews with a painful dilemma—the choice between fulfilling a religious obligation and serving their country. Should the draft be reinstated, compulsion will replace choice. Although the pain the services inflict on Orthodox Jewish servicemen is clearly the result of insensitivity rather than design, it is unworthy of our military because it is unnecessary. The Court and the military have refused these servicemen their constitutional rights; we must hope that Congress will correct this wrong.

JUSTICE BLACKMUN, dissenting.

I would reverse the judgment of the Court of Appeals, but for reasons somewhat different from those respectively enunciated by JUSTICE BRENNAN and JUSTICE O'CONNOR. I feel that the Air Force is justified in considering not only the costs of allowing Captain Goldman to cover his head indoors, but also the cumulative costs of accommodating constitutionally indistinguishable requests for religious exemptions. Because, however, the Government has failed to make any meaningful showing that either set of costs is significant, I dissent from the Court's rejection of Goldman's claim.

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[5] I refer to all of the military services rather than just to the Air Force because, as the Government emphasizes in its brief, Brief for Respondents 20, n. 11, all of the uniformed services have dress and appearance regulations comparable to AFR 35-10, and the Court's decision in this case will apply to all the services. Furthermore, all Military Departments are subject to the recent Department of Defense Directive 1300.17 (June 18, 1985) which deals with the accommodation of religious practices. This Directive does not provide for the type of exception sought by Dr. Goldman.

The Government concedes that Goldman wears his yarmulke out of sincere religious conviction. For Goldman, as for many other Jews, "a yarmulke is an expression of respect for God . . . intended to keep the wearer aware of God's presence." App. 156 (petitioner's deposition). If the Free Exercise Clause of the First Amendment means anything, it must mean that an individual's desire to follow his or her faith is not simply another personal preference, to be accommodated by government when convenience allows. Indeed, this Court has read the Clause, I believe correctly, to require that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin* v. *Yoder*, 406 U. S. 205, 215 (1972). In general, government "may justify an inroad on religious liberty [only] by showing that it is the least restrictive means of achieving some compelling state interest." *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707, 718 (1981); see also *Sherbert* v. *Verner*, 374 U. S. 398 (1963). The clear import of *Sherbert*, *Yoder*, and *Thomas* is that this showing must be made even when the inroad results from the "evenhanded" application of a facially neutral requirement. "Rules are rules" is not by itself a sufficient justification for infringing religious liberty.

Nor may free exercise rights be compromised simply because the military says they must be. To be sure, application of the First Amendment to members of the Armed Services must take into account "the different character of the military community and of the military mission." *Parker* v. *Levy*, 417 U. S. 733, 758 (1974). As JUSTICE BRENNAN and JUSTICE O'CONNOR point out, however, military personnel do not forfeit their constitutional rights as a price of enlistment. Except as otherwise required by "interests of the highest order," soldiers as well as civilians are entitled to follow the dictates of their faiths.

In my view, this case does not require us to determine the extent to which the ordinary test for inroads on religious freedom must be modified in the military context, because the Air Force has failed to produce even a minimally credible explanation for its refusal to allow Goldman to keep his head covered indoors. I agree with the Court that deference is due the considered judgment of military professionals that, as a general matter, standardized dress serves to promote discipline and esprit de corps. But Goldman's modest supplement to the Air Force uniform clearly poses by itself no threat to the Nation's military readiness. Indeed, the District Court specifically found that Goldman has worn a yarmulke on base for years without any adverse effect on his performance, any disruption of operations at the base, or any complaints from other personnel. *Goldman* v. *Secretary of Defense*, 29 EPD ¶32,753, pp. 25,540–25,541 (1982).

The Air Force argues that it has no way of distinguishing fairly between Goldman's request for an exemption and the potential requests of others whose religious practices may conflict with the appearance code, perhaps in more conspicuous ways. In theory, this argument makes some sense. Like any rules prescribing a uniform, the Air Force dress code is by nature arbitrary; few of its requirements could be defended on purely functional grounds. Particularly for personnel such as Goldman who serve in noncombat roles, variations from the prescribed attire frequently will interfere with no military goals other than those served by uniformity itself. There thus may be no basis on which to distinguish some variations from others, aside from the degree to which they detract from the overall image of the service, a criterion that raises special constitutional problems when applied to religious practices. To allow noncombat personnel to wear yarmulkes but not turbans or dreadlocks because the latter seem more obtrusive—or, as JUSTICE BRENNAN suggests, less "polished" and "professional," *ante*, at 519–520—would be to discriminate in favor of this country's more established, mainstream religions, the practices of which are more familiar to the average observer. Not only would conventional faiths receive special treatment under such an approach; they would receive special treatment precisely *because* they are conventional. In general, I see no constitutional difficulty in distinguishing between religious practices based on how difficult it would be to accommodate them, but favoritism based on how unobtrusive a practice appears to the majority could create serious problems of equal protection and religious establishment, problems the Air Force clearly has a strong interest in avoiding by drawing an objective line at visibility.

The problem with this argument, it seems to me, is not doctrinal but empirical. The Air Force simply has not shown any reason to fear that a significant number of enlisted personnel and officers would request religious exemptions that could not be denied on neutral grounds such as safety, let alone that granting these requests would noticeably impair the overall image of the service. Cf. *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S., at 719; *Sherbert* v. *Verner*, 374 U. S., at 407. The Air Force contends that the potential for such disruption was demonstrated at trial through the introduction of an Army publication discussing the beliefs and practices of a variety of religious denominations, some of which have traditions or requirements involving attire. See Department of the Army Pamphlet No. 165–13–1, Religious Requirements and Practices of Certain Selected Groups: A Handbook Supplement for Chaplains (1980). But that publication provides no indication whatsoever as to how many soldiers belong to the denominations it describes, or as to how many are likely to seek religious exemptions from the dress code.

In these circumstances, deference seems unwarranted. Reasoned military judgments, of course, are entitled to respect, but the military has failed to show that this particular judgment with respect to Captain Goldman is a reasoned one. If, in the future, the Air Force is besieged with requests for religious exemptions from the dress code, and those requests cannot be distinguished on functional grounds from Goldman's, the service may be able to argue credibly that circumstances warrant a flat rule against any visible religious apparel. That, however, would be a case different from the one at hand.

JUSTICE O'CONNOR, with whom JUSTICE MARSHALL joins, dissenting.

The issue posed in this case is whether, consistent with the Free Exercise Clause of the First Amendment, the Air Force may prohibit Captain Goldman, an Orthodox Jewish psychologist, from wearing a yarmulke while he is in uniform on duty inside a military hospital.

The Court rejects Captain Goldman's claim without even the slightest attempt to weigh his asserted right to the free exercise of his religion against the interest of the Air Force in uniformity of dress within the military hospital. No test for free exercise claims in the military context is even articulated, much less applied. It is entirely sufficient for the Court if the military perceives a need for uniformity.

JUSTICE STEVENS acknowledges that "Captain Goldman's military duties are performed in a setting in which a modest departure from the uniform regulation creates almost no danger of impairment of the Air Force's military mission." *Ante*, at 511 (concurring). Nevertheless, JUSTICE STEVENS is persuaded that a governmental regulation based on *any* "neutral, completely objective standard," *ante*, at 513, will survive a free exercise challenge.

In contrast, JUSTICE BRENNAN recognizes that the Court "overlooks the sincere and serious nature of [the] constitutional claim." *Ante*, at 514 (dissenting). He properly notes that, even with respect to military rules and regulations, the courts have a duty to weigh sincere First Amendment claims of its members against the necessity of the particular application of the rule. But JUSTICE BRENNAN applies no particular test or standard to determine such claims.

JUSTICE BLACKMUN focuses on the particular ways in which the military may pursue its interest in uniformity, *ante,* at 526–527 (dissenting), but nonetheless declines "to determine the extent to which the ordinary test for inroads on religious freedom must be modified in the military context," *ante,* at 526.

I believe that the Court should attempt to articulate and apply an appropriate standard for a free exercise claim in the military context, and should examine Captain Goldman's claim in light of that standard.

Like the Court today in this case involving the military, the Court in the past has had some difficulty, even in the civilian context, in articulating a clear standard for evaluating free exercise claims that result from the application of general state laws burdening religious conduct. In *Sherbert* v. *Verner,* 374 U. S. 398 (1963), and *Thomas* v. *Review Bd. of Indiana Employment Security Div.,* 450 U. S. 707 (1981), the Court required the States to demonstrate that their challenged policies were "the least restrictive means of achieving some compelling state interest" in order to deprive claimants of unemployment benefits when the refusal to work was based on sincere religious beliefs. *Thomas, supra,* at 718. See also *Sherbert, supra,* at 406–408. In *Wisconsin* v. *Yoder,* 406 U. S. 205, 215 (1972), the Court noted that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion" in deciding that the Amish were exempt from a State's requirement that children attend school through the age of 16. In *United States* v. *Lee,* 455 U. S. 252, 257–258 (1982), the Court stated that "[t]he State may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest," and held that the Amish could not exempt themselves from the Social Security system on religious grounds. See also *Gillette* v. *United States,* 401 U. S. 437 (1971) (rejecting challenges under the Establishment and Free Exercise Clauses to the

Federal Government's refusal to give conscientious-objector status to those objecting on religious grounds only to a particular war rather than to all wars).

These tests, though similar, are not identical. One can, however, glean at least two consistent themes from this Court's precedents. First, when the government attempts to deny a free exercise claim, it must show that an unusually important interest is at stake, whether that interest is denominated "compelling," "of the highest order," or "overriding." Second, the government must show that granting the requested exemption will do substantial harm to that interest, whether by showing that the means adopted is the "least restrictive" or "essential," or that the interest will not "otherwise be served." These two requirements are entirely sensible in the context of the assertion of a free exercise claim. First, because the government is attempting to override an interest specifically protected by the Bill of Rights, the government must show that the opposing interest it asserts is of especial importance before there is any chance that its claim can prevail. Second, since the Bill of Rights is expressly designed to protect the individual against the aggregated and sometimes intolerant powers of the state, the government must show that the interest asserted will in fact be substantially harmed by granting the type of exemption requested by the individual.

There is no reason why these general principles should not apply in the military, as well as the civilian, context. As this Court has stated unanimously, "'our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.'" *Chappell* v. *Wallace*, 462 U. S. 296, 304 (1983) (quoting Warren, The Bill of Rights and the Military, 37 N. Y. U. L. Rev. 181, 188 (1962)). Furthermore, the test that one can glean from this Court's decisions in the civilian context is sufficiently flexible to take into account the special importance of defending our Nation without abandoning completely the freedoms that make it worth defending.

The first question that the Court should face here, therefore, is whether the interest that the Government asserts against the religiously based claim of the individual is of unusual importance. It is perfectly appropriate at this step of the analysis to take account of the special role of the military. The mission of our Armed Services is to protect our Nation from those who would destroy all our freedoms. I agree that, in order to fulfill that mission, the military is entitled to take some freedoms from its members. As the Court notes, the military "'must insist upon a respect for duty and a discipline without counterpart in civilian life.'" *Ante*, at 507 (quoting *Schlesinger* v. *Councilman*, 420 U. S. 738, 757 (1975)). The need for military discipline and esprit de corps is unquestionably an especially important governmental interest.

But the mere presence of such an interest cannot, as the majority implicitly believes, end the analysis of whether a refusal by the Government to honor the free exercise of an individual's religion is constitutionally acceptable. A citizen pursuing even the most noble cause must remain within the bounds of the law. So, too, the Government may, even in pursuing its most compelling interests, be subject to specific restraints in doing so. The second question in the analysis of a free exercise claim under this Court's precedents must also be reached here: will granting an exemption of the type requested by the individual do substantial harm to the especially important governmental interest?

I have no doubt that there are many instances in which the unique fragility of military discipline and esprit de corps necessitates rigidity by the Government when similar rigidity to preserve an assertedly analogous interest would not pass constitutional muster in the civilian sphere. Compare *Greer* v. *Spock*, 424 U. S. 828 (1976), with *Metromedia, Inc.* v. *San Diego*, 453 U. S. 490 (1981), and *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 630–634 (1943).

Nonetheless, as JUSTICE BRENNAN persuasively argues, the Government can present no sufficiently convincing proof in *this* case to support an assertion that granting an exemption of the type requested here would do substantial harm to military discipline and esprit de corps. *Ante*, at 517–520 (dissenting).

First, the Government's asserted need for absolute uniformity is contradicted by the Government's own exceptions to its rule. As JUSTICE BRENNAN notes, *ante*, at 518, an Air Force dress code in force at the time of Captain Goldman's service states:

> "Neither the Air Force nor the public expects absolute uniformity of appearance. Each member has the right, within limits, to express individuality through his or her appearance. However, the image of a disciplined service member who can be relied on to do his or her job excludes the extreme, the unusual, and the fad." AFR 35–10, ¶1–12.a.(2) (1978).

Furthermore, the Government does not assert, and could not plausibly argue, that petitioner's decision to wear his yarmulke while indoors at the hospital presents a threat to health or safety. And finally, the District Court found as fact that in this particular case, far from creating discontent or indiscipline in the hospital where Captain Goldman worked, "[f]rom September 1977 to May 7, 1981, *no objection* was raised to Goldman's wearing of his yarmulke while in uniform." See *Goldman* v. *Secretary of Defense*, 29 EPD ¶32,753, p. 25,539 (1982) (emphasis added).

In the rare instances where the military has not consistently or plausibly justified its asserted need for rigidity of enforcement, and where the individual seeking the exemption establishes that the assertion by the military of a threat to discipline or esprit de corps is in his or her case completely unfounded, I would hold that the Government's policy of uniformity must yield to the individual's assertion of the right of free exercise of religion. On the facts of this case, therefore, I would require the Government to accommodate the sincere religious belief of Captain Goldman. Napoleon may have been correct to assert that, in the military sphere, morale is to all other factors as three is to one,* but contradicted assertions of necessity by the military do not on the scales of justice bear a similarly disproportionate weight to sincere religious beliefs of the individual.

I respectfully dissent.

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*See Letter, Aug. 27, 1808 ("In war, moral considerations account for three-quarters, the balance of actual forces only for the other quarter"), as translated and quoted in J. Cohen & M. Cohen, The Penguin Dictionary of Quotations 268 (1962).

BENDER ET AL. *v.* WILLIAMSPORT AREA SCHOOL DISTRICT ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 84-773. Argued October 15, 1985—Decided March 25, 1986

When a group of high school students in Williamsport, Pennsylvania, formed a club for the purpose of promoting "spiritual growth and positive attitudes in the lives of its members," they asked the Principal for permission to hold club meetings on the school premises during student activity periods. The matter was referred to the School Superintendent, who denied permission on the basis of an opinion of the School District Solicitor, and the School Board upheld the denial. The students then filed suit in Federal District Court against the School District, members of the School Board, the Superintendent, and the Principal, alleging that the refusal to allow the club to meet on the same basis as other student groups because of its religious activities violated the First Amendment, and seeking declaratory and injunctive relief. The District Court, on motions for summary judgment, ruled in the students' favor, but entered no injunction and granted no relief against any defendant in his individual capacity. The School District took no appeal, but complied with the judgment and allowed the students' club to conduct the meetings as requested. However, respondent Youngman (hereafter respondent), who was then still a member of the School Board, did appeal. No one raised any question about his standing to appeal, and the Court of Appeals held in his favor.

Held: Respondent had no standing to appeal, and therefore the Court of Appeals had no jurisdiction to hear his appeal. Pp. 541–549.

(a) Federal courts have only the power that is authorized by Article III of the Constitution and the federal statutes enacted pursuant thereto. Every federal appellate court must satisfy itself that the party seeking to invoke its jurisdiction has a sufficient stake in the outcome of the litigation to support that jurisdiction. Pp. 541–543.

(b) Respondent had no standing to appeal in his individual capacity. Although the complaint alleged that the action was brought against the defendants "in their individual and official capacities," there is nothing else in the complaint or in the record to support the suggestion that relief was sought or awarded against any School Board member in his *individual* capacity. P. 543.

(c) As a member of the School Board sued in his official capacity, respondent had no personal stake in the outcome of the litigation and therefore had no standing to appeal in that capacity. His status as a Board member did not permit him to "step into the shoes of the Board" and invoke its right to appeal. Pp. 543–545.

(d) Nor did respondent have standing to appeal in his capacity as a parent of a student attending the high school. There is nothing in the record to indicate anything about his status as a parent or to indicate that he or his children have suffered any injury as a result of the District Court's judgment or of the activities of the club in question subsequent to the entry of that judgment. Respondent was not sued as a parent and thus was plainly not a "party" in that capacity in the District Court. Pp. 545–549.

741 F. 2d 538, vacated and remanded.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and O'CONNOR, JJ., joined. MARSHALL, J., filed a concurring opinion, *post*, p. 549. BURGER, C. J., filed a dissenting opinion, in which WHITE and REHNQUIST, JJ., joined, *post*, p. 551. POWELL, J., filed a dissenting opinion, *post*, p. 555.

James M. Smart, Jr., argued the cause for petitioners. With him on the briefs were *Samuel Eric Hans Ericsson*, *Lynn Robert Buzzard*, *Kimberlee Wood Colby*, *Curran Tiffany*, *Gerald W. Seevers*, and *Michael Joseph Woodruff*.

Deputy Solicitor General Fried argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Lee*, *Acting Assistant Attorney General Willard*, *Michael W. McConnell*, *Anthony J. Steinmeyer*, and *Robert V. Zener*.

John C. Youngman, Jr., *pro se*, argued the cause for respondents and filed a brief for himself.*

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*Briefs of *amici curiae* urging reversal were filed for the Ad Hoc Group of State Education Officials, School Administrators, and School Board Members by *William H. Ellis;* for the Catholic League for Religious and Civil Rights by *Steven Frederick McDowell;* for the Concerned Women for American Education and Legal Defense Foundation by *Michael P. Farris* and *Jordan W. Lorence;* for the Inter-Varsity Christian Fellowship of the U. S. A. by *George R. Grange II;* and for the United States Catholic Conference by *Wilfred R. Caron* and *Mark E. Chopko*.

Briefs of *amici curiae* urging affirmance were filed for the American Association of School Administrators by *David S. Tatel* and *Elliot M. Mincberg;* for the American Civil Liberties Union et al. by *Jack D. Novik*, *Charles S. Sims*, *Burt Neuborne*, *Stefan Presser*, and *Joy L. Koletsky;* for

JUSTICE STEVENS delivered the opinion of the Court.

This case raises an important question of federal appellate jurisdiction that was not considered by the Court of Appeals: Whether one member of a School Board has standing to appeal from a declaratory judgment against the Board. We conclude that although the School Board itself had a sufficient stake in the outcome of the litigation to appeal, an individual Board member cannot invoke the Board's interest in the case to confer standing upon himself.

I

In September 1981 a group of high school students in Williamsport, Pennsylvania, formed a club called "Petros" for the purpose of promoting "spiritual growth and positive attitudes in the lives of its members." App. 46. The group asked the Principal of the high school for permission to meet on school premises during student activity periods scheduled during the regular schoolday on Tuesdays and Thursdays. The Principal allowed Petros to hold an organizational meeting that was attended by approximately 45 students. At that meeting passages of scripture were read and some students prayed. There is no evidence that any students, or parents, expressed any opposition or concern about future meetings of Petros. The Principal nevertheless advised the group that they could not hold any further meetings until he had discussed the matter with the School Superintendent.

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the American Jewish Committee et al. by *Samuel Rabinove, Richard T. Foltin, William B. Duffy, Jr.*, and *William S. Ellis;* for the American Jewish Congress et al. by *Robert Reinstein, Jeffrey I. Pasek, Theodore R. Mann*, and *Nathan Z. Dershowitz;* and for the Anti-Defamation League of B'nai B'rith et al. by *Ruti G. Teitel, Justin J. Finger, Meyer Eisenberg, Jeffrey P. Sinensky*, and *Steven M. Freeman*.

Briefs of *amici curiae* were filed for the Baptist Joint Committtee on Public Affairs et al. by *Donald R. Brewer;* for Kiwanis International et al. by *Stanley C. Fickle;* and for the Rutherford Institute et al. by *Larry L. Crain, Guy O. Farley, Jr., John W. Whitehead, James J. Knicely, Thomas S. Neuberger, Thomas O. Kotouc*, and *William B. Hollberg*.

The Superintendent, in turn, advised the students that he would respond to their written request for recognition after he received "competent legal advice [from the School District's Solicitor] as to the propriety of approving establishment of the proposed prayer club" on school premises. *Id.*, at 42.

On November 16, 1981, the Principal and the Superintendent met with representatives of Petros and advised them that "based on the Solicitor's legal opinion, their request must be denied." 563 F. Supp. 697, 701 (MD Pa. 1983). The legal opinion is not a part of the record; nor does the record contain any evidence that the Principal, the Superintendent, or any other person except the Solicitor had voiced any opposition to the proposed meetings by Petros. Indeed, Petros was informed that it could meet off school premises and "would be given released time during the activity period" if it could secure "a location and an adult supervisor, preferably a clergyman" for their meetings. *Ibid.*

The students thereafter wrote a letter to the Chairman of the Williamsport Area School Board appealing the Superintendent's decision. At a meeting held January 19, 1982, the Board upheld the Superintendent's decision and "denied the appeal on the basis of the Solicitor's opinion." *Ibid.* (citations omitted).

II

On June 2, 1982, 10 of the students filed suit in the United States District Court against the Williamsport Area School District, the 9 members of the School Board, the Superintendent of the District, and the Principal of the high school. Although there is a general allegation in the first paragraph of the complaint that the action was brought against the defendants "in their individual and official capacities," App. 13, the specific allegation concerning each of the named members of the Board was in this form: "John C. Youngman, Jr., is a member of the Williamsport Area School Board and is sued in that capacity," *id.*, at 16. The complaint alleged that the defendants' refusal to recognize Petros and to allow it to meet on the same basis as other student groups because of its religious activities violated the First Amendment. The complaint prayed for declaratory and injunctive relief.

One answer was filed on behalf of all the defendants. Although they admitted most of the material allegations of the complaint, they alleged that they had "requested and received in writing an opinion from the school district solicitor and legal counsel that it would be unlawful, improper and unconstitutional to recognize said group as a student organization." *Id.*, at 33.

After plaintiffs completed their discovery (defendants took no depositions), the parties filed cross-motions for summary judgment supported by affidavits, the deposition testimony, and statements of material fact not in dispute. On November 9, 1982, the District Court entered an order finding that the record was incomplete. It thereupon directed the parties to submit affidavits or other documentation concerning "the exact nature of the activity period, the type of activities or clubs that have been, and would be, approved, and what proposed groups, if any, have been denied approval." *Id.*, at 101. After that additional information was supplied, and after the case had been fully briefed, the District Court on May 12, 1983, filed a detailed and carefully written opinion in which it stated:

> "Presently before the court are the parties' cross-motions for summary judgment. . . . Although the case presents only a question of law, this is not to say that the facts are unimportant. On the contrary, the undisputed facts are of paramount importance to the resolution of the legal question presented in this case. A slight change in the facts could very well have dictated a contrary decision.
>
> "After carefully reviewing those facts, and after giving full consideration to all pertinent legal authority,

> the court concludes that because the defendant school district is not constitutionally required to deny the plaintiffs the opportunity to meet, by doing so solely on constitutional grounds it has impermissibly burdened their free-speech rights. Accordingly, summary judgment will be granted in favor of the plaintiffs." 563 F. Supp., at 699–700.

The final order entered by the District Court was a ruling "in favor of the plaintiffs and against the defendants on plaintiffs' freedom of speech claim."[1] No injunction was entered, and no relief was granted against any defendant in his individual capacity. The District Court, in effect, merely held that the Board's attorney was incorrect in his legal advice.

The School District did not challenge the judgment of the District Court in any way. It made no motion for a stay and took no appeal. Instead, it decided to comply with the judgment and to allow Petros to conduct the meetings it had requested.

However, John C. Youngman, Jr., who was then still a member of the Board, did file a timely notice of appeal.[2]

III

In the Court of Appeals no one raised any question about Mr. Youngman's standing to appeal. The court did note that all of the original plaintiffs had graduated from high school, but it granted a motion to add additional plaintiffs who were currently enrolled students in order to prevent the case from becoming moot. 741 F. 2d 538, 542, n. 4 (CA3 1984). Neither the majority nor the dissenting opinion even mentioned Mr. Youngman.

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[1] The full text of the court's order read as follows:

"NOW, this 12th day of May, 1983, in accordance with the reasoning set forth in the accompanying Opinion, it is hereby ordered that:

"(1) Summary judgment is granted in favor of the defendants and against the plaintiffs on plaintiffs' free exercise claim;

"(2) Summary judgment is granted in favor of the plaintiffs and against the defendants on plaintiffs' freedom of speech claim; and,

"(3) The Clerk of the Court shall close this case." App. to Pet. for Cert. 105a.

[2] We are advised that his term of office expired while the case was pending before the Court of Appeals.

After repeatedly stressing "the crucial role which the particular facts play in every first amendment analysis," *id.*, at 541–542,[3] the majority of the Court of Appeals held "that the particular circumstances disclosed by this record and present at the Williamsport Area High School lead to the inexorable conclusion that the constitutional balance of interests tilts against permitting the Petros activity to be conducted within the school as a general activity program," *id.*, at 561.

In dissent, Judge Adams suggested that the majority had implicitly adopted a *per se* rule because of its concern about "the possibility of unconstitutional extensions of the Williamsport arrangement elsewhere," instead of performing the "more difficult adjudicative task [of carefully sifting the facts] on a case-by-case basis." *Id.*, at 569.

The importance of the question presented by the students' petition for certiorari persuaded us that the case merited plenary review. 469 U. S. 1206 (1985). After granting certiorari, however, we noticed that neither the Board nor any of the defendants except Mr. Youngman opposed the students' position and that only Mr. Youngman had challenged the District Court's judgment by invoking the jurisdiction of the Court of Appeals. We therefore find it necessary to answer the question whether Mr. Youngman had a sufficient stake in the outcome of the litigation to support appellate jurisdiction. The parties and the *amici* have identified three different capacities in which Mr. Youngman may have had standing to appeal—as an individual, as a member of the Board, and as a parent.

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[3] In this regard, consider also the Court of Appeals' emphasis on "the specific facts of the case," 741 F. 2d, at 559 (emphasis deleted); its statement that the "facts of this case concededly present a close question," *ibid.;* its reference to "the unique situation presented here," *id.*, at 559, n. 28; and the following statement:

"Because each additional fact and factor impacts so heavily upon a school prayer analysis in a determination as to whether the particular circumstances pass constitutional muster, we feel it necessary to be precise in considering the relevant facts leading to a particular conclusion." *Id.*, at 560, n. 30.

IV

Before considering each of the standing theories, it is appropriate to restate certain basic principles that limit the power of every federal court. Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto. See, *e. g.*, *Marbury* v. *Madison*, 1 Cranch 137, 173–180 (1803). For that reason, every federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review," even though the parties are prepared to concede it. *Mitchell* v. *Maurer*, 293 U. S. 237, 244 (1934). See *Juidice* v. *Vail*, 430 U. S. 327, 331–332 (1977) (standing). "And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *United States* v. *Corrick*, 298 U. S. 435, 440 (1936) (footnotes omitted).[4]

This obligation to notice defects in a court of appeals' subject-matter jurisdiction assumes a special importance when a constitutional question is presented. In such cases we have strictly adhered to the standing requirements to ensure that our deliberations will have the benefit of adversary presentation and a full development of the relevant facts.[5] Thus, as we emphasized in *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 472 (1982):

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[4] See also, *e. g.*, *Sumner* v. *Mata*, 449 U. S. 539, 547–548, n. 2 (1981); *City of Kenosha* v. *Bruno*, 412 U. S. 507, 511 (1973); *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 588 (1939); *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283, 287–288, n. 10 (1938); *Stratton* v. *St. Louis Southwestern R. Co.*, 282 U. S. 10, 13 (1930); *Louisville & Nashville R. Co.* v. *Mottley*, 211 U. S. 149, 152 (1908) (citing cases); *Cameron* v. *Hodges*, 127 U. S. 322, 325 (1888). Cf. *Capron* v. *Van Noorden*, 2 Cranch 126, 127 (1804).

> "[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 99 (1979), and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision,' *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 38, 41 (1976). . . .
>
> "The requirement of 'actual injury redressable by the court,' *Simon, supra*, at 39, serves several of the 'implicit policies embodied in Article III,' *Flast* [v. *Cohen*, 392 U. S. 83,] 96 [(1968)]. It tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action. The 'standing' requirement serves other purposes. Because it assures an actual factual setting in which the litigant asserts a claim of injury in fact, a court may decide the

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[5] We have frequently recognized the importance of the facts and the factfinding process in constitutional adjudication. See, *e. g., Minnick* v. *California Dept. of Corrections*, 452 U. S. 105, 120–127 (1981); *England* v. *Louisiana Board of Medical Examiners*, 375 U. S. 411, 416 (1964) ("How the facts are found will often dictate the decision of federal claims"); *Townsend* v. *Sain*, 372 U. S. 293, 312 (1963) ("It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues"). Cf. *supra*, at 538–540, and n. 3.

case with some confidence that its decision will not pave the way for lawsuits which have some, but not all, of the facts of the case actually decided by the court."

V

The first paragraph of the complaint alleged that the action was brought against the defendants "in their individual and official capacities." App. 13. There is, however, nothing else in the complaint, or in the record on which the District Court's judgment was based, to support the suggestion that relief was sought against any School Board member in his or her *individual* capacity. Certainly the District Court's judgment granted no such relief. See n. 1, *supra.* Accordingly, to paraphrase our holding in *Brandon* v. *Holt,* 469 U. S. 464, 469 (1985), "[t]he course of proceedings . . . make it abundantly clear that the action against [Mr. Youngman] was in his official capacity and only in that capacity." See *Kentucky* v. *Graham,* 473 U. S. 159, 167, n. 14 (1985). Since the judgment against Mr. Youngman was not in his individual capacity, he had no standing to appeal in that capacity.[6]

VI

As a member of the School Board sued in his official capacity Mr. Youngman has no personal stake in the outcome of the litigation and therefore did not have standing to file the notice of appeal. As we held in *Brandon* v. *Holt*, *supra*, "a judgment against a public servant 'in his official capacity' imposes liability on the entity that he represents provided, of course, the public entity received notice and an opportunity to respond." *Id.*, at 471–472. We repeated this point in *Kentucky* v. *Graham:*

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[6] The fact that Mr. Youngman was sued in his official capacity does not give him standing to appeal in his individual capacity. Acts performed by the same person in two different capacities "are generally treated as the transactions of two different legal personages." F. James & G. Hazard, Civil Procedure § 11.6, p. 594 (3d ed. 1985).

The fact that Mr. Youngman is named in a petition for attorney's fees that was filed in the District Court after the appeal was taken clearly cannot affect his standing to appeal. Moreover, as we held in *Kentucky* v. *Graham,* 473 U. S., at 165 (footnote and citation omitted), "liability on the merits and responsibility for fees go hand in hand; where a defendant has not been prevailed against, either because of legal immunity or on the merits, [42 U. S. C.] § 1988 does not authorize a fee award against that defendant." Accord, *id.,* at 164, 168–170.

> "Official-capacity suits . . . 'generally represent only another way of pleading an action against an entity of which an officer is an agent.' *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 690, n. 55 (1978). As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. *Brandon*, *supra*, at 471–472. It is *not* a suit against the official personally, for the real party in interest is the entity. Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself." 473 U. S., at 165–166 (emphasis in original, footnote omitted).

Mr. Youngman's status as a School Board member does not permit him to "step into the shoes of the Board" and invoke its right to appeal. In this case, Mr. Youngman was apparently the lone dissenter in a decision by the other eight members of the School Board to forgo an appeal. Tr. of Oral Arg. 7. Generally speaking, members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take.[7] The Court of Appeals for the District of Columbia Circuit so held in *Smuck* v. *Hobson*, 132 U. S. App. D. C. 372, 374–375, 408 F. 2d 175, 177–178 (1969) (en banc) (footnote omitted):

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[7] It might be an entirely different case if, for example, state law authorized School Board action solely by unanimous consent, in which event Mr. Youngman might claim that he was legally entitled to protect "the effectiveness of [his] vot[e]." *Coleman* v. *Miller*, 307 U. S. 433, 438 (1939). See *id.*, at 438–446; *id.*, at 456 (Black, J., concurring). But in

> "We also find that Mr. Smuck has no appealable interest as a member of the Board of Education. While he was in that capacity a named defendant, the Board of Education was undeniably the principal figure and could have been sued alone as a collective entity. Appellant Smuck had a fair opportunity to participate in its defense, and in the decision not to appeal. Having done so, he has no separate interest as an individual in the litigation. The order directs the Board to take certain actions. But since its decisions are made by vote as a collective whole, there is no apparent way in which Smuck as an individual could violate the decree and thereby become subject to enforcement proceedings."

See *id.*, at 387, 408 F. 2d, at 190 (McGowan, J., concurring in part and concurring in result).

VII

At oral argument Mr. Youngman advised the Court that he is the parent of at least one student attending the Williams-

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that event Mr. Youngman would have to allege that his vote was diluted or rendered nugatory under state law and even then he would have a mandamus or like remedy against the Secretary of the School Board, cf. *id.*, at 436–437 (mandamus action "to compel a proper record of legislative action"); he would not be entitled to take legal action in the Board's authority in his own name. For the same reason, Mr. Youngman does not have standing on the rationale employed in *Board of Education* v. *Allen*, 392 U. S. 236, 241, n. 5 (1968), that he was forced to violate his constitutional oath. Unlike the members of the School Board *majority* in *Allen* who were put "in the position of having to choose between violating their oath and taking a step . . . that would be likely to bring their expulsion from office and also a reduction in state funds for their school districts," *ibid.*, Mr. Youngman has voted his conscience and, as a member of the Board, must abide by its decision not to appeal absent some state-law provision to the contrary.

port Area High School and that as a matter of conscience he is opposed to prayer activities on school premises during regular school hours. The Solicitor General submits that Mr. Youngman's status as a parent provides an adequate predicate for federal appellate jurisdiction.

Mr. Youngman's status as an aggrieved parent, however, like any other kindred fact showing the existence of a justiciable "case" or "controversy" under Article III, must affirmatively appear in the record.[8] As the first Justice Harlan observed, "the presumption . . . is that the court below was without jurisdiction" unless "the contrary appears affirmatively from the record." *King Bridge Co.* v. *Otoe County*, 120 U. S. 225, 226 (1887). Accord, *Thomas* v. *Board of Trustees*, 195 U. S. 207, 210 (1904); *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 62–63 (1904). That lack of standing was not noticed by either party matters not, for as we said in *Mansfield C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379, 382 (1884):

> "[T]he rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise

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[8] "The rules of standing, whether as aspects of the Art. III case-or-controversy requirement or as reflections of prudential considerations defining and limiting the role of the courts, are threshold determinants of the propriety of judicial intervention. It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Warth* v. *Seldin*, 422 U. S. 490, 517–518 (1975). See *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, 190 (1936) ("Here, the allegation in the bill of complaint as to jurisdictional amount was traversed by the answer. The court made no adequate finding upon that issue of fact, and the record contains no evidence to support the allegation of the bill. There was thus no showing that the District Court had jurisdiction and the bill should have been dismissed upon that ground"); *Jackson* v. *Ashton*, 8 Pet. 148, 149 (1834); *Bingham* v. *Cabot*, 3 Dall. 382, 383–384 (1798).

> of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it."

Accord, *Chicago, B. & Q. R. Co.* v. *Willard*, 220 U. S. 413, 419 (1911); *Kentucky* v. *Powers*, 201 U. S. 1, 35–36 (1906); *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 U. S. 449, 453 (1900). See *Thomson* v. *Gaskill*, 315 U. S. 442, 446 (1942). Moreover, because it is not "sufficient that jurisdiction may be inferred argumentatively from averments in the pleadings," *Grace* v. *American Central Ins. Co.*, 109 U. S. 278, 284 (1883); *Thomas* v. *Board of Trustees*, 195 U. S., at 210, it follows that the necessary factual predicate may not be gleaned from the briefs and arguments themselves. This "first principle of federal jurisdiction" applies "whether the case is at the trial stage or the appellate stage." P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 835–836 (2d ed. 1973).

There is nothing in the record indicating anything about Mr. Youngman's status as a parent. Nor is there anything in the record to indicate that he or his children have suffered any injury as a result of the District Court's judgment, or as a result of the activities of Petros subsequent to the entry of that judgment. For all that appears in the record, Mr. Youngman and his children might even be active supporters of Petros.

The reasons why Mr. Youngman may not take an appeal in his individual capacity also foreclose an appeal in his capacity as a parent. His interest as a parent in the outcome of the litigation differs from his interest as a member of the School Board which, as we have already noted, is legally that of a "different legal personage." See n. 6, *supra*. Since Mr. Youngman was not sued as a parent in the District Court, he had no right to participate in the proceedings in that court in that capacity without first filing an appropriate motion or pleading setting forth the claim or defense that he desired to assert.[9] Thus, even if one were amenable to the dissent's unprecedented (and unexplained) suggestion that the principle governing determination of subject-matter jurisdiction should be relaxed on appeal, the proposed exception for litigants who were "proper part[ies]" in the District Court, *post*, at 552, would not help Mr. Youngman because he could not perfect an appeal in either capacity in which he was a "party" in the District Court, *i. e.*, as a School Board member sued in his individual capacity or as a Board member sued in his official capacity. Tacitly conceding Mr. Youngman's lack of standing on these two bases, the dissent instead would confer standing on Mr. Youngman as a parent—a capacity in which he plainly was not a party in the District Court and to which, therefore, the dissent's reasoning does not apply. Having failed to assert his parental interest in the District Court—or to adduce any factual support for that interest in this Court—Mr. Youngman has no right to prosecute an appeal in his capacity as a parent.

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[9] Because his status as a parent was obviously different from his official status as a member of the Board, in order to participate as a parent in the District Court litigation it was incumbent upon Mr. Youngman under Rule 24 of the Federal Rules of Civil Procedure to make "timely application" by an appropriate motion "stat[ing] the grounds" for intervention and "setting forth the claim or defense for which intervention is sought." Fed. Rules Civ. Proc. 24(a), (c). No such pleading was filed in either of the courts below. It is particularly important to observe these requirements in cases in which the interest of the litigant seeking to appeal diverges from the interest of the party to the suit. In this case, Mr. Youngman's interest as a parent was not necessarily parallel to the interest of the School Board. For although the record plainly demonstrates that the School Board was interested in obeying the law—it dutifully followed its lawyer's advice when he concluded that group worship conducted on school premises would violate the Establishment Clause—it also decided not to appeal the District Court's contrary ruling, and the record does not indicate that the Board disfavored (or favored) groups such as Petros.

We therefore hold that because the Court of Appeals was without jurisdiction to hear the appeal, it was without authority to decide the merits. Accordingly, the judgment of the Court of Appeals is vacated, and the case is remanded with instructions to dismiss the appeal for want of jurisdiction.

It is so ordered.

JUSTICE MARSHALL, concurring.

I join JUSTICE STEVENS' opinion for the Court. I write separately to emphasize that the parties cannot, contrary to the contention of the Solicitor General and THE CHIEF JUSTICE, invoke the Article III jurisdiction of this Court through a belated nontestimonial statement by Mr. Youngman that he is a parent of a child in the Williamsport Area High School.

This lawsuit on appeal was *not* "the same dispute between the same parties," *post,* at 551, as the one conducted in the District Court. The dispute litigated in the District Court was one between certain students wishing to conduct prayer group activities as part of an official school activity period, on the one hand, and a School Board that refused them permission to do so, on the other. Mr. Youngman participated in that lawsuit only as a member of the School Board, sued in his official capacity. The real party in interest in that lawsuit was the Board. *Kentucky* v. *Graham,* 473 U. S. 159, 165–166 (1985). That controversy ended with the entry of the District Court judgment; the School Board, voting 8–1 with Mr. Youngman in the minority, abandoned its earlier position and agreed to allow plaintiffs to conduct the prayer group activities they sought. There was therefore nothing left to litigate between those parties.

The lawsuit sought to be litigated on appeal is a different one. This dispute, under THE CHIEF JUSTICE's theory, is one between Mr. Youngman, asserting that he is a parent of a child in the Williamsport Area High School whose First Amendment rights would be infringed by his attendance at a school whose activities impermissibly advance religion, on the one hand, and students seeking to conduct prayer group activities, on the other. The School Board itself is nowhere to be found. I do not contest that Mr. Youngman could pursue this dispute on appeal had he intervened in the lawsuit in his capacity as a parent. Absent such intervention, it is conceivable that Mr. Youngman might bottom his standing to raise such an argument on facts in the record setting out his status as a parent. There are, however, no such facts anywhere in the extensive record in this case. There is not one word in the record indicating that Mr. Youngman is a father at all. Nor did Mr. Youngman claim such status in his notice of appeal. App. 166.

In fact, the brief for respondent filed in this Court suggests that Mr. Youngman did *not* have a child in the Williamsport Area High School when he filed his notice of appeal from the District Court's decision on June 10, 1983. Benjamin Youngman, rather, apparently is claimed to have begun studying at that school several months later, in the fall of 1983. Brief for Respondent Youngman 6, and n. 3. Assertions in the parties' briefs are not part of the record for purposes of determining our jurisdiction. This discrepancy, however, illustrates the wisdom of our long-established rule requiring that the facts supporting our Article III jurisdiction "appea[r] affirmatively from the record." *King Bridge Co.* v. *Otoe County*, 120 U. S. 225, 226 (1887).

Because no facts appear in the record supporting Mr. Youngman's status as the parent of a child enrolled in the Williamsport Area High School opposed to petitioners' activities, I join the opinion and judgment of the Court vacating the judgment below and remanding with instructions to dismiss the appeal for want of jurisdiction.

CHIEF JUSTICE BURGER, with whom JUSTICE WHITE and JUSTICE REHNQUIST join, dissenting.

I agree with the Court that the judgment of the District Court allowing Petros to meet during the student extracurricular activity period must be reinstated. Because respondent Youngman had standing to appeal, however, I would reach the merits of this dispute and reverse the judgment of the Court of Appeals.

I

Mr. Youngman is a parent of a student at Williamsport High School; as a matter of conscience he is opposed to prayer activities on school premises during school hours. As this Court has repeatedly held, parents have standing to challenge conditions in public schools that their children attend. See *Engel* v. *Vitale*, 370 U. S. 421 (1962); *Zorach* v. *Clauson*, 343 U. S. 306 (1952). The Court's principal objection to Youngman's standing as a parent stems from his failure "'to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.'" *Ante*, at 545–547, and n. 8 (quoting *Warth* v. *Seldin*, 422 U. S. 490, 518 (1975)). It is, of course, perfectly sensible to impose such pleading burdens upon the plaintiff who initiates the litigation. These burdens, however, need not be placed upon a properly named defendant, like Mr. Youngman, who seeks to invoke the jurisdiction of the Court of Appeals. Once the jurisdiction of the district court over a particular dispute is established, it seems clear that the same dispute between the same parties will remain within the Article III powers of the courts on appeal. To be sure, we require that the case or controversy requirement be met throughout the course of the litigation. But the method for determining whether the case or controversy exists and the burdens placed on the parties should not, indeed cannot, be the same on appeal as in the district court. At the district court stage, the facts required by

Warth, *supra*, should normally appear on the face of the complaint. At the appellate stage, however, the "complaining party" does not allege any facts but merely identifies himself as a party to the case in the district court and challenges the validity of that decision. Only if the appellant's standing is challenged must he allege facts sufficient to convince the court of appeals that he is a proper party to pursue the appeal. Here, petitioners not only failed to challenge Youngman's standing before the Court of Appeals, they also conceded that, had they challenged Youngman's standing, he would have satisfied the *Warth* standing test. Tr. of Oral Arg. 5.

II

I would reach the issue the Court granted certiorari to address: whether the Establishment Clause requires a public high school to prevent a student-initiated, student-led group from meeting during an extracurricular activity period.

The Establishment Clause prohibits Congress and, through the Fourteenth Amendment, the States from passing any law "respecting an establishment of religion." As we have observed on other occasions, the precise contours of this prohibition remain unclear. But it is common ground that nothing in the Establishment Clause requires the State to suppress a person's speech merely because the *content* of the speech is religious in character. In *McDaniel* v. *Paty*, 435 U. S. 618, 641 (1978), JUSTICE BRENNAN emphasized in his opinion concurring in the judgment that "[t]he Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." And more recently, in *Widmar* v. *Vincent*, 454 U. S. 263 (1981), we held that the Establishment Clause did not justify a university's content-based exclusion of religious speech from a forum generally open to student groups.

Widmar clearly controls the resolution of this case. Petros is a student-initiated and student-led group seeking the same forum available to other student extracurricular activity groups. The students would have been allowed to meet to discuss moral philosophy or Marxism, to practice French, or to play chess; but, since they chose to worship, the school decided that it could not allow the group to meet without violating the Establishment Clause.

The Court of Appeals agreed that the Establishment Clause prohibited Petros from meeting on school premises because to allow it to meet could have been misinterpreted by other students as active state support of religion. Under that analysis, because an individual's discussion of religious beliefs may be confused by others as being that of the State, both must be viewed as the same. Yet the several commands of the First Amendment require vision capable of distinguishing between *state* establishment of religion, which is prohibited by the Establishment Clause, and *individual* participation and advocacy of religion which, far from being prohibited by the Establishment Clause, is affirmatively protected by the Free Exercise and Free Speech Clauses of the First Amendment. If the latter two commands are to retain any vitality, utterly unproven, subjective impressions of some hypothetical students should not be allowed to transform *individual* expression of religious belief into *state* advancement of religion.

No one would contend that the State would be authorized to dismantle a church erected by private persons on private property because overwhelming evidence showed that other members of the community *thought* the church was owned and operated by the State. That the "primary effect" of state inaction might turn out to advance the cause of organized religion has no bearing upon the threshold question of whether the challenged activity is conducted by the State or by individuals.

The Establishment Clause mandates state neutrality, not hostility, toward religion. As Justice Black stated for the Court in *Everson* v. *Board of Education*, 330 U. S. 1, 18 (1947), the First Amendment "requires the state to be neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them." In *Zorach* v. *Clauson*, 343 U. S. 306 (1952), the Court upheld a state law allowing schools to release students, during school hours, so that they could receive religious instruction elsewhere. Although the State did not compel students to go to religious classes, the program undoubtedly advanced the cause of religion. Justice Douglas, writing for the Court, eloquently rejected the suggestion that the program thereby violated the Establishment Clause:

> "We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups." *Id.*, at 313–314.

By granting the student prayer group equal access to the student activity forum, the order of the District Court "follows the best of our traditions," *id.*, at 314, and is wholly consistent with the Constitution. Although I would have reached this issue on the merits, it is appropriate that the Court, by vacating the judgment of the Court of Appeals, restores the sound analysis and judgment of the District Court.

JUSTICE POWELL, dissenting.

I agree with THE CHIEF JUSTICE that respondent Youngman has standing to appeal, and also agree with much of his dissenting opinion. I write briefly to say that on its merits, this case is controlled by *Widmar* v. *Vincent*, 454 U. S. 263 (1981).

As in that case, respondent School District simply had "created a forum generally open for use by student groups." *Id.*, at 267. The School District provided 30-minute periods on Tuesdays and Thursdays for high school students to meet in groups in separate school rooms for extracurricular activities, including discussion or debate on any subject of their choosing. A religious group was formed for reading passages of scripture and for prayer. Although there were no complaints by students, faculty, or parents, on the basis of a legal opinion the Principal advised the group that it could not meet during these periods. As THE CHIEF JUSTICE observes in his dissent, this is "a student-initiated and student-led group seeking the same forum available to other student extracurricular activity groups." *Ante*, at 553. At the time of this suit, there was a total of 25 identified groups, each organized by students. All of these groups were free to discuss any subject other than a religious one.

In *Widmar*, under essentially the same circumstances, we held that the University of Missouri at Kansas City had "discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment." 454 U. S., at 269. The only arguable distinction between *Widmar* and this case is that *Widmar* involved university students while the groups here are composed of high school students. We did note in *Widmar* that university students are "less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion." *Id.*, at 274, n. 14. Other decisions, however, have recognized that the First Amendment rights of speech and association extend also to high school students. See, *e. g.*, *Board of Education* v. *Pico*, 457 U. S. 853, 864 (1982) (opinion of BRENNAN, J.); *Tinker* v. *Des Moines School District*, 393 U. S. 503, 506–507 (1969) (citing cases). I do not believe—particularly in this age of massive media information—that the few years difference in age between high school and college students justifies departing from *Widmar*. I accordingly dissent.

PAULUSSEN *v.* HERION

APPEAL FROM THE SUPERIOR COURT OF PENNSYLVANIA

No. 85-88. Argued March 5, 1986—Decided March 25, 1986

In 1980, appellant filed a paternity and child support petition in a Pennsylvania court on behalf of her 7-year-old daughter, who had been born out of wedlock, alleging that appellee was the natural father and had ceased making contributions to the daughter's support in 1975. The court held that the action was barred under the state statute of limitations, which then required that paternity actions be commenced within six years of the child's birth or within two years of the putative father's last voluntary support contribution or written acknowledgment of paternity. Appellant's contention that the statute violated the Equal Protection Clause of the Fourteenth Amendment was rejected. The Pennsylvania Superior Court affirmed.

Held: The judgment below is vacated, and the case is remanded for further consideration in light of Pennsylvania's intervening enactment of a new statute providing that a paternity action may be commenced at any time within 18 years of the child's birth. Appellee conceded that he was subject to the new statute and would be liable for child support from the date paternity was established, but he contended that he would not be liable for support payments dating back to when the petition was filed in 1980. If the Pennsylvania court were to interpret the new statute to require payments dating back to 1980, the constitutionality of the 6-year statute of limitations would be irrelevant.

334 Pa. Super. 585, 483 A. 2d 892, vacated and remanded.

Esther L. Hornik argued the cause for appellant. With her on the brief were *Angela L. Martinez* and *Donald J. Martin.*

Joseph N. Onek argued the cause for appellee. On the brief was *Neil H. Stein.**

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*Briefs of *amici curiae* urging reversal were filed for the Children's Defense Fund et al. by *Constance Jean Chatwood, Jane Howard-Martin, Marian Wright Edelman, James D. Weill,* and *Judith L. Lichtman;* and for the Neighborhood Legal Services Association by *Daniel L. Haller* and *Eileen D. Yacknin.*

PER CURIAM.

On February 17, 1980, appellant Barbara Paulussen filed a paternity and child support petition in a Bucks County, Pennsylvania, court on behalf of her daughter, who was then seven years old. The petition alleged that the daughter had been born out of wedlock, that appellee George Herion was her natural father, and that he had ceased making contributions to her support in April 1975. Appellee offered as a defense the time bar of the Pennsylvania statute of limitations, which at the time required that paternity actions be commenced within six years of the child's birth or within two years of the putative father's last voluntary support contribution or written acknowledgment of paternity. 42 Pa. Cons. Stat. Ann., § 6704(e) (Purdon 1982) (repealed). The defense was sustained against appellant's contention that the statute violated the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution. The Superior Court affirmed, 334 Pa. Super. 585, 483 A. 2d 892 (1985), and the Supreme Court of Pennsylvania denied discretionary review. Appellant sought appeal in this Court, and, on October 15, 1985, we noted probable jurisdiction. 474 U. S. 899 (1985).

On October 30, 1985, Pennsylvania enacted 1985 Pa. Laws, Act No. 66, to be codified as 23 Pa. Cons. Stat. Ann. § 4343(b), which provides that a child born out of wedlock may commence a paternity action at any time within 18 years of birth. Appellee now concedes that he is subject to § 4343(b) and that, upon a showing of paternity, he would be liable for child support payments from the date paternity was established. Brief for Appellee 5. He contends, however, that, even on such a showing, he would not be liable for payments dating back to the date the initial petition was filed in 1980.

Our examination of Pennsylvania law leaves us uncertain as to the legal consequences of the enactment of the new 18-year statute of limitations. If, however, Pennsylvania were to interpret § 4343(b) to require support payments dating back to the filing of the original petition, the constitutionality of the 6-year statute of limitations would be irrelevant. Because Pennsylvania should have an opportunity in the first instance to resolve this issue of state law, and because we are reluctant to address a federal constitutional question until it is clearly necessary to do so, we vacate the judgment below and remand for further consideration in light of the intervening change in state law.

It is so ordered.

HOLBROOK, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION, ET AL. *v.* FLYNN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 84-1606. Argued January 14, 1986—Decided March 26, 1986

After respondent and others were indicted for armed robbery in Rhode Island Superior Court, they were held without bail. When the trial was about to begin, four uniformed state troopers were sitting in the front row of the spectators' section of the courtroom to supplement the customary security force, which was overextended at the time. Respondent's counsel objected to the troopers' presence, but this objection was overruled by the trial justice, primarily on the basis of *voir dire* responses during the selection of the jury indicating that the troopers' presence would not affect the defendants' ability to receive a fair trial. Respondent was convicted, and the Rhode Island Supreme Court affirmed. Respondent then brought a habeas corpus proceeding in Federal District Court, which also rejected his objections to the troopers' presence. The Court of Appeals reversed, holding that the trial justice had failed to consider whether the particular circumstances of respondent's trial had called for the troopers' presence and that the justice had improperly relied on the jurors' *voir dire* responses to rebut any suggestion of prejudice to respondent.

Held: The troopers' presence at respondent's trial was not so inherently prejudicial that he was thereby denied his constitutional right to a fair trial. Pp. 567-572.

(a) While an accused is entitled to have his guilt or innocence determined solely on the basis of evidence introduced at trial, this does not mean that every practice tending to single out an accused from everyone else in the courtroom must be struck down. Pp. 567-568.

(b) The conspicuous, or at least noticeable, presence of guards in a courtroom during trial is not the sort of inherently prejudicial practice that should be permitted only where justified by an essential state interest. Such presence need not be interpreted as a sign that the defendant is particularly dangerous or culpable. Jurors may just as easily believe that the guards are there to prevent outside disruptions or eruptions of violence in the courtroom. Reason, principle, and human experience counsel against a presumption that any use of identifiable guards in a courtroom is inherently prejudicial. In view of the variety of ways in which such guards can be deployed, a case-by-case approach is more appropriate. Pp. 568–569.

(c) Whenever a courtroom arrangement is challenged as inherently prejudicial, the question is not whether the jurors articulated a consciousness of some prejudicial effect, but rather whether there was an unacceptable risk of prejudice. In this case, there is no justification for finding such an unacceptable risk based on the troopers' presence. Even if the jurors had been aware that the deployment of troopers was not common practice, there is no reason to believe that the troopers' presence tended to brand respondent with guilt. Their presence was unlikely to have been taken as a sign of anything other than a normal official concern for safety and order. Moreover, even if a slight degree of prejudice could be attributed to the troopers' presence, sufficient cause for their presence could be found in the State's need to maintain custody over defendants who had been denied bail. The troopers' presence was intimately related to the State's legitimate interest in maintaining such custody and thus did not offend the Equal Protection Clause by arbitrarily discriminating against those unable to post bail or to whom bail has been denied. Pp. 570–572.

(d) Since this case involves a federal court's review of a constitutional challenge to a state-court proceeding, the federal court's task is not to determine whether it might have been feasible for the State to have employed less conspicuous security measures in the courtroom, but only whether what the jurors saw was so inherently prejudicial as to pose an unacceptable threat to the defendants' right to a fair trial. Respondent has failed to show the existence of such inherent prejudice and has not shown actual prejudice. P. 572.

749 F. 2d 961, reversed.

MARSHALL, J., delivered the opinion for a unanimous Court. BURGER, C. J., filed a concurring opinion, *post*, p. 572.

Thomas More Dickinson, Special Assistant Attorney General of Rhode Island, argued the cause for petitioners. With him on the brief were *Arlene Violet*, Attorney General, and *John Austin Murphy*.

George Kannar argued the cause for respondent. With him on the brief were *Charles S. Sims* and *Burt Neuborne*.*

**John K. Van de Kamp*, Attorney General, *Karl S. Mayer*, Assistant Attorney General, and *Robert E. Niver*, Deputy Attorney General, filed a brief for the State of California as *amicus curiae* urging reversal.

JUSTICE MARSHALL delivered the opinion of the Court.

The question presented in this case is whether a criminal defendant was denied his constitutional right to a fair trial when, at his trial with five codefendants, the customary courtroom security force was supplemented by four uniformed state troopers sitting in the first row of the spectators' section.

I

On August 14, 1975, nine masked men entered the Bonded Vault Co. in Providence, Rhode Island, robbed several employees at gunpoint, broke into most of the safe-deposit boxes in the vault, and escaped with approximately $4 million in cash and valuables. In January 1976, respondent and eight others were indicted in Providence County Superior Court for that crime. After a hearing in Superior Court, respondent and five of his alleged accomplices were ordered held without bail in the custody of the Warden of the State's Adult Correctional Institution.[1]

In April 1976, respondent and his five codefendants were brought to trial in Superior Court before Associate Justice Anthony A. Giannini. Upon entering the courtroom, respondent's counsel noted the presence of four uniformed state troopers, sitting in the first row of the spectators' section; the officers were not far behind, but were separated by the "bar" from, the seats assigned to the defendants for the duration of the trial.[2] Counsel immediately complained to the judge that "the defendants would object to uniformed police, uniformed state police, sitting in the court as a display of 'strength' in the presence of the jury." Tr. 48–49. While counsel observed that he would have no objection to the use of any number of plainclothed security personnel, he argued that the presence of uniformed officers would suggest to the jury that defendants were of "bad character." *Id.*, at 48. Justice Giannini replied that the troopers were present because the Committing Squad, which usually supplied courtroom security personnel in such cases, was overextended at that time. Noting that he had not personally requested the assistance of the troopers, the judge agreed to see whether they might be made to wear civilian clothes for their future appearances in the courtroom.

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[1] Of the remaining three defendants, two were fugitives at the time of respondent's trial, and the third appeared at that proceeding as a witness for the State.

[2] Although the record could have been clearer on this point, all the colloquies in the record corroborate the statement, made by respondent's counsel later in pretrial proceedings, that "sitting behind the defendants, taking the first row, vacating the first row where the spectators sit, are four uniformed state police guards, armed. . . ." Tr. 80; see *id.*, at 71–72. The troopers appear to have maintained this position throughout the course of the trial, although at times there might have been only three of them in the courtroom. See, *e. g.*, *id.*, at 109, 146.

The following week, Justice Giannini announced that he had "received a report that it is not practical, both from an organization point of view and also from a contractual point of view with the union representing the state troopers," for the four troopers to dress in civilian clothes. *Id.*, at 71. In the face of these constraints and in view of the need for adequate security, the justice ruled that the troopers could remain in the courtroom, in full uniform. He noted that because the troopers would be seated behind the bar, defendants would in no way be prejudiced. The next day, denying defendants' motion for reconsideration, Justice Giannini asserted that though he himself had not made the decision to deploy the troopers, he thought defendants "overly sensitive" to the danger of prejudice. *Id.*, at 84. At any rate, the justice went on, an examination of prospective jurors would reveal whether they were likely to draw adverse inference from the troopers' presence, and would thereby guarantee the rights of the defendants. Jury selection began.

In the meantime, respondent sought interlocutory review in the Rhode Island Supreme Court of Justice Giannini's ruling. After initially declining review, the Supreme Court read a transcript of the ruling and granted respondent's petition. Noting that "[t]he presence of armed, uniformed police officers acting as a security force in criminal courtrooms in this jurisdiction is a departure from the practice usually found in the trial courts of this state," the court concluded: "The trial justice may not delegate responsibility that is his to the so-called security committee or its advisors. The presence of the State Police is a decision that must be resolved solely by the trial justice after consideration of all relevant factors." *State* v. *Byrnes*, 116 R. I. 925, 927, 357 A. 2d 448, 449 (1976).

Upon the State's request, Justice Giannini conducted a hearing at which the first witness was Captain Robert Melucci, the principal officer of the Committing Squad, the group charged with maintaining courtroom security during the trials of defendants in pretrial detention.[3] He testified that, because of other commitments in the courthouse, the force of 12 officers available for deployment in the building was insufficient to maintain the preferred ratio of 2 officers to every defendant in this six-defendant trial. Since any ratio approaching one-to-one posed a "security risk," Tr. 120, and he could spare only six officers for respondent's trial, Captain Melucci had contacted the Superior Court's presiding justice and informed him of the need for additional security personnel. As a result, Captain Melucci testified, additional help had been sought from the State Police.

The next witness, Major Lionel Benjamin, Executive Officer of the Rhode Island State Police, explained that any time his force was charged with transporting prisoners from the Adult Correctional Institution to the courthouse and maintaining custody during trial, he was contractually obligated to use officers from the uniformed division. That same contract with the Fraternal Order of Police, according to Major Benjamin, precluded him from asking members of the uniformed division to perform their duties in civilian clothing. The Major went on to note that even were there no contractual bar, the force's plainclothes detective division lacked the personnel to provide security for the duration of respondent's trial. He concluded by saying that if the court required his troopers to wear civilian clothes, he would withdraw them. *Id.*, at 161.

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[3] The name of the Committing Squad has been changed to "Rhode Island state marshals." 1976 R. I. Pub. Laws, ch. 259, § 1 (codified at R. I. Gen. Laws § 42-56-3) (1984 reenactment).

After completing jury selection, Justice Giannini gave his final ruling on respondent's motion. He noted that "if these defendants were admitted to bail, there would be no state policemen and there would be no committing squad officers in this courtroom." *Id.*, at 229. But bail having been denied, it became the responsibility of the Warden and the Committing Squad to maintain custody of the detainees. The justice found that because the Committing Squad lacked the resources, the necessary level of security could be ensured only with the help of the uniformed troopers. Having held the presence of the troopers "justified by the evidence," Justice Giannini considered whether the presence of the troopers had prejudiced the defendants. He observed that of the 54 prospective jurors who had not been struck before they were asked about the troopers, 51 had responded that the troopers' presence "created no inference of guilt with regard to the defendants in their mind"; the remaining 3 had not precisely addressed the question. *Id.*, at 230–231. When asked to speculate why the troopers were present, many had given a vague response as to the need for security. In view of the *voir dire* responses, the justice concluded that the presence of the troopers would not affect defendants' ability to receive a fair trial.

The trial lasted more than two months and ended with verdicts acquitting three defendants and convicting respondent and two others. On appeal, the Rhode Island Supreme Court affirmed the convictions. *State* v. *Byrnes*, 433 A. 2d 658 (1981). With respect to respondent's objection to the troopers, the court concluded:

> "[T]he trial justice gave a reasoned and careful consideration of the issues raised by the presence of the uniformed troopers and, after consideration of all relevant factors, found that the presence of the troopers in no way prejudiced defendants. We have read the record, and we find no reason whatsoever to fault his conclusion." *Id.*, at 663.

Respondent then brought this habeas proceeding in Federal District Court. After certain procedural complications not relevant here, the District Court for the District of Rhode Island entertained the petition and rejected all the claims therein. With respect to respondent's objection to the presence of the troopers throughout the trial, the court held: "Less totalitarian alternatives appear to have been explored and rejected on rational grounds. The security measures approved here, extreme though they might have been, did not, under the totality of the circumstances, deny due process or equal protection to the petitioner." 581 F. Supp. 990, 998 (1984).

The Court of Appeals, however, reversed this dismissal. 749 F. 2d 961 (CA1 1984). Seizing upon the Rhode Island Supreme Court's observation that the presence of uniformed and armed troopers had been an "extraordinary" event, the Court of Appeals concluded that Justice Giannini had failed to consider whether the particular circumstances of respondent's trial had called for such measures.

> "Rather, with no threats shown to safety, he balanced nothing, but simply indicated a fear that since the defendants had not been bailed, they might flee from the courtroom. There was no evidence even suggesting any unusual likelihood of this; nor had anything whatever made 'manifest' the 'necessity for heightened security.' As for the exploration of less 'totalitarian alternatives,' the exploration was limited, notwithstanding defendants' suggestions, to inquiring whether regular commitment officers were available without inconveniencing the Pre-

> siding Justice, and whether the union contract permitted the state police to appear out of uniform and unarmed." *Id.*, at 964.

Dismissing the trial judge's reliance on jurors' *voir dire* responses to rebut any suggestion of prejudice to respondent, the Court of Appeals asserted: "Even if all jurors had indicated an unreserved opinion that the troopers' presence would not affect them, such expression, on a case as extreme as this, where there was no need to rely on it, is totally unacceptable." *Id.*, at 965. The court ordered that the writ of habeas corpus be granted.

We granted certiorari, 472 U. S. 1026 (1985), and now reverse.

II

A

Central to the right to a fair trial, guaranteed by the Sixth and Fourteenth Amendments, is the principle that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." *Taylor* v. *Kentucky*, 436 U. S. 478, 485 (1978). This does not mean, however, that every practice tending to single out the accused from everyone else in the courtroom must be struck down. Recognizing that jurors are quite aware that the defendant appearing before them did not arrive there by choice or happenstance, we have never tried, and could never hope, to eliminate from trial procedures every reminder that the State has chosen to marshal its resources against a defendant to punish him for allegedly criminal conduct. To guarantee a defendant's due process rights under ordinary circumstances, our legal system has instead placed primary reliance on the adversary system and the presumption of innocence. When defense counsel vigorously represents his client's interests and the trial judge assiduously works to impress jurors with the need to presume the defendant's innocence, we have trusted that a fair result can be obtained.

Our faith in the adversary system and in jurors' capacity to adhere to the trial judge's instructions has never been absolute, however. We have recognized that certain practices pose such a threat to the "fairness of the factfinding process" that they must be subjected to "close judicial scrutiny." *Estelle* v. *Williams*, 425 U. S. 501, 503–504 (1976). Thus, in *Estelle* v. *Williams*, we noted that where a defendant is forced to wear prison clothes when appearing before the jury, "the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment." *Id.*, at 504–505. Since no "essential state policy" is served by compelling a defendant to dress in this manner, *id.*, at 505, this Court went no further and concluded that the practice is unconstitutional. This close scrutiny of inherently prejudicial practices has not always been fatal, however. In *Illinois* v. *Allen*, 397 U. S. 337 (1970), the Court emphasized that a defendant may be prejudiced if he appears before the jury bound and gagged. "Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold." *Id.*, at 344. Yet the Court nonetheless observed that in certain extreme situations, "binding and gagging might possibly be the fairest and most reasonable way to handle" a particularly obstreperous and disruptive defendant. *Ibid.*

B

The first issue to be considered here is thus whether the conspicuous, or at least noticeable, deployment of security personnel in a courtroom during trial is the sort of inherently prejudicial practice that, like shackling, should be permitted only where justified by an essential state interest specific to each trial. We do not believe that it is.

The chief feature that distinguishes the use of identifiable security officers from courtroom practices we might find inherently prejudicial is the wider range of inferences that a juror might reasonably draw from the officers' presence. While shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large, the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable. Jurors may just as easily believe that the officers are there to guard against disruptions emanating from outside the courtroom or to ensure that tense courtroom exchanges do not erupt into violence. Indeed, it is entirely possible that jurors will not infer anything at all from the presence of the guards. If they are placed at some distance from the accused, security officers may well be perceived more as elements of an impressive drama than as reminders of the defendant's special status. Our society has become inured to the presence of armed guards in most public places; they are doubtless taken for granted so long as their numbers or weaponry do not suggest particular official concern or alarm. See *Hardee* v. *Kuhlman*, 581 F. 2d 330, 332 (CA2 1978).

To be sure, it is possible that the sight of a security force within the courtroom might under certain conditions "create the impression in the minds of the jury that the defendant is dangerous or untrustworthy." *Kennedy* v. *Cardwell*, 487 F. 2d 101, 108 (CA6 1973), cert. denied, 416 U. S. 959 (1974). However, "reason, principle, and common human experience," *Williams*, *supra*, at 504, counsel against a presumption that any use of identifiable security guards in the courtroom is inherently prejudicial. In view of the variety of ways in which such guards can be deployed, we believe that a case-by-case approach is more appropriate.

III

A

The courtroom security force in this case consisted of four uniformed state troopers, two Deputy Sheriffs, and six Committing Squad officers. Though respondent does not concede that the deployment of the uniformed Committing Squad officers was proper, his focus at every stage of his habeas proceedings has been exclusively on the prejudice he attributes to the four state troopers. The only question we need answer is thus whether the presence of these four uniformed and armed officers was so inherently prejudicial that respondent was thereby denied his constitutional right to a fair trial.

The Court of Appeals was correct to find that Justice Giannini's assessment of jurors' states of mind cannot be dispositive here. If "a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process," *Estes* v. *Texas*, 381 U. S. 532, 542–543 (1965), little stock need be placed in jurors' claims to the contrary. See *Sheppard* v. *Maxwell*, 384 U. S. 333, 351–352 (1966); *Irvin* v. *Dowd*, 366 U. S. 717, 728 (1961). Even though a practice may be inherently prejudicial, jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused. This will be especially true when jurors are questioned at the very beginning of proceedings; at that point, they can only speculate on how they will feel after being exposed to a practice daily over the course of a long trial. Whenever a courtroom arrangement is challenged as inherently prejudicial, therefore, the question must be not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether "an unacceptable risk is presented of impermissible factors coming into play," *Williams*, 425 U. S., at 505.

We do not minimize the threat that a roomful of uniformed and armed policemen might pose to a defendant's chances of receiving a fair trial. See ABA Standards for Criminal Justice 15-3.1(c) (2d ed. 1980). But we simply cannot find an unacceptable risk of prejudice in the spectacle of four such officers quietly sitting in the first row of a courtroom's spectator section.[4] Even had the jurors been aware that the deployment of troopers was not common practice in Rhode Island, we cannot believe that the use of the the four troopers tended to brand respondent in their eyes "with an unmistakable mark of guilt." *Williams, supra,* at 518 (BRENNAN, J., dissenting). Cf. *Dorman* v. *United States,* 140 U. S. App. D. C. 313, 327, 435 F. 2d 385, 397 (1970) (greater danger of prejudice if jury aware that arrangements are extraordinary). Four troopers are unlikely to have been taken as a sign of anything other than a normal official concern for the safety and order of the proceedings. Indeed, any juror who for some other reason believed defendants particularly dangerous might well have wondered why there were only four armed troopers for the six defendants.

We note, moreover, that even were we able to discern a slight degree of prejudice attributable to the troopers' presence at respondent's trial, sufficient cause for this level of security could be found in the State's need to maintain custody over defendants who had been denied bail after an individualized determination that their presence at trial could not otherwise be ensured. Unlike a policy requiring detained defendants to wear prison garb, the deployment of troopers was intimately related to the State's legitimate interest in maintaining custody during the proceedings and thus did not offend the Equal Protection Clause by arbitrarily discriminating against those unable to post bail or to whom bail had been denied. See *Williams*, *supra*, at 505–506.

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[4] The only social science study to which respondent has pointed us addresses the effects of prison clothes and courtroom guards upon jury verdicts. Its tentative conclusion is that defendants clad in prison garb or accompanied by guards are more likely to be found guilty than unsupervised defendants wearing their own clothes. However, the study also found that favored treatment was accorded defendants who had *both* supervision *and* prison clothing. Fontaine & Kiger, The Effects of Defendant Dress and Supervision on Judgments of Simulated Jurors: An Exploratory Study, 2 Law and Human Behavior 63, 69-70 (1978). In view of these curious and concededly tentative results, we will, at least for now, rely on our own experience and common sense.

B

The Court of Appeals rejected as wholly inadequate the reasons advanced by state authorities and accepted by Justice Giannini to explain why the four uniformed troopers had to be present at respondent's trial. However, our task here is not to determine whether it might have been feasible for the State to have employed less conspicuous security measures in the courtroom. While, in our supervisory capacity, we might express a preference that officers providing courtroom security in federal courts not be easily identifiable by jurors as guards,[5] we are much more constrained when reviewing a constitutional challenge to a state-court proceeding. All a federal court may do in such a situation is look at the scene presented to jurors and determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial; if the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over. Respondent has failed to carry his burden here.

The judgment of the Court of Appeals is

Reversed.

CHIEF JUSTICE BURGER, concurring.

I write only to explain my reading of the Court's statement that "in our supervisory capacity, we *might* express a preference that officers providing courtroom security in federal courts not be easily identifiable by jurors as guards . . . ." *Ante*, at 572 (emphasis added). In joining the opinion, I interpret the Court's carefully qualified statement in this case—a state case—as containing no suggestion that federal officers providing security must doff their uniforms before entering federal courtrooms, and certainly none of the three cases the Court cites, *ante*, at 572, n. 5, would require any such arbitrary action. Moreover, the issue of what kind of security arrangements some might "prefer" is, of course, quite distinct from issues such as whether a federal defendant would become entitled to a new trial because of an alleged prejudicial effect of the security measures used at his trial. On this understanding, I join the Court's opinion.

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[5] See, *e. g.*, *United States* v. *Jackson*, 549 F. 2d 517, 526–527 (CA8), cert. denied *sub nom. Muhammed* v. *United States*, 430 U. S. 985 (1977); *United States* v. *Clardy*, 540 F. 2d 439, 442–443 (CA9), cert. denied, 429 U. S. 963 (1976); *Kennedy* v. *Cardwell*, 487 F. 2d 101, 109 (CA6 1973), cert. denied, 416 U. S. 959 (1974). See also N. Dorsen & L. Friedman, Disorder in the Court 249 (1973).

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD, ET AL. *v.* ZENITH RADIO CORP. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 83-2004. Argued November 12, 1985—Decided March 26, 1986

Petitioners are 21 Japanese corporations or Japanese-controlled American corporations that manufacture and/or sell "consumer electronic products" (CEPs) (primarily television sets). Respondents are American corporations that manufacture and sell television sets. In 1974, respondents brought an action in Federal District Court, alleging that petitioners, over a 20-year period, had illegally conspired to drive American firms from the American CEP market by engaging in a scheme to fix and maintain artificially high prices for television sets sold by petitioners in Japan and, at the same time, to fix and maintain low prices for the sets exported to and sold in the United States. Respondents claim that various portions of this scheme violated, *inter alia*, §§ 1 and 2 of the Sherman Act, § 2(a) of the Robinson-Patman Act, and § 73 of the Wilson Tariff Act. After several years of discovery, petitioners moved for summary judgment on all claims. The District Court then directed the parties to file statements listing all the documentary evidence that would be offered if the case went to trial. After the statements were filed, the court found the bulk of the evidence on which respondents relied was inadmissible, that the admissible evidence did not raise a genuine issue of material fact as to the existence of the alleged conspiracy, and that any inference of conspiracy was unreasonable. Summary judgment therefore was granted in petitioners' favor. The Court of Appeals reversed. After determining that much of the evidence excluded by the District Court was admissible, the Court of Appeals held that the District Court erred in granting a summary judgment and that there was both direct and circumstantial evidence of a conspiracy. Based on inferences drawn from the evidence, the Court of Appeals concluded that a reasonable factfinder could find a conspiracy to depress prices in the American market in order to drive out American competitors, which conspiracy was funded by excess profits obtained in the Japanese market.

Held: The Court of Appeals did not apply proper standards in evaluating the District Court's decision to grant petitioners' motion for summary judgment. Pp. 582–598.

(a) The "direct evidence" on which the Court of Appeals relied—petitioners' alleged supracompetitive pricing in Japan, the "five company rule" by which each Japanese producer was permitted to sell only to five American distributors, and the "check prices" (minimum prices fixed by agreement with the Japanese Government for CEPs exported to the United States) insofar as they established minimum prices in the United States—cannot by itself give respondents a cognizable claim against petitioners for antitrust damages. Pp. 582–583.

(b) To survive petitioners' motion for a summary judgment, respondents must establish that there is a genuine issue of material fact as to whether petitioners entered into an illegal conspiracy that caused respondents to suffer a cognizable injury. If the factual context renders respondents' claims implausible, *i. e.*, claims that make no economic sense, respondents must offer more persuasive evidence to support their claims than would otherwise be necessary. To survive a motion for a summary judgment, a plaintiff seeking damages for a violation of § 1 of the Sherman Act must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. Thus, respondents here must show that the inference of a conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents. Pp. 585–588.

(c) Predatory pricing conspiracies are by nature speculative. They require the conspirators to sustain substantial losses in order to recover uncertain gains. The alleged conspiracy is therefore implausible. Moreover, the record discloses that the alleged conspiracy has not succeeded in over two decades of operation. This is strong evidence that the conspiracy does not in fact exist. The possibility that petitioners have obtained supracompetitive profits in the Japanese market does not alter this assessment. Pp. 588–593.

(d) Mistaken inferences in cases such as this one are especially costly, because they chill the very conduct that the antitrust laws are designed to protect. There is little reason to be concerned that by granting summary judgment in cases where the evidence of conspiracy is speculative or ambiguous, courts will encourage conspiracies. Pp. 593–595.

(e) The Court of Appeals erred in two respects: the "direct evidence" on which it relied had little, if any, relevance to the alleged predatory pricing conspiracy, and the court failed to consider the absence of a plausible motive to engage in predatory pricing. In the absence of any rational motive to conspire, neither petitioners' pricing practices, their conduct in the Japanese market, nor their agreements respecting prices and distributions in the American market sufficed to create a "genuine issue for trial" under Federal Rule of Civil Procedure 56(e). On remand, the Court of Appeals may consider whether there is other, unambiguous evidence of the alleged conspiracy. Pp. 595–598.

723 F. 2d 238, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and MARSHALL, REHNQUIST, and O'CONNOR, JJ., joined. WHITE, J., filed a dissenting opinion, in which BRENNAN, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 598.

Donald J. Zoeller argued the cause for petitioners. With him on the briefs were *John L. Altieri, Jr.*, *Harold G. Levison*, *Peter J. Gartland*, *James S. Morris*, *Kevin R. Keating*, *Charles F. Schirmeister*, *Ira M. Millstein*, *A. Paul Victor*, *Jeffrey L. Kessler*, *Carl W. Schwarz*, *Michael E. Friedlander*, *William H. Barrett*, *Donald F. Turner*, and *Henry T. Reath.*

Charles F. Rule argued the cause *pro hac vice* for the United States as *amicus curiae* urging reversal. With him on the brief were *Acting Solicitor General Wallace*, *Charles S. Stark*, *Robert B. Nicholson*, *Edward T. Hand*, *Richard P. Larm*, *Abraham D. Sofaer*, and *Elizabeth M. Teel.*

Edwin P. Rome argued the cause for respondents. With him on the brief were *William H. Roberts*, *Arnold I. Kalman*, *Philip J. Curtis*, and *John Borst, Jr.**

JUSTICE POWELL delivered the opinion of the Court.

This case requires that we again consider the standard district courts must apply when deciding whether to grant summary judgment in an antitrust conspiracy case.

I

Stating the facts of this case is a daunting task. The opinion of the Court of Appeals for the Third Circuit runs to 69 pages; the primary opinion of the District Court is more than three times as long. *In re Japanese Electronic Products*

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*Briefs of *amici curiae* urging reversal were filed for the Government of Japan by *Stephen M. Shapiro;* and for the American Association of Exporters and Importers et al. by *Robert Herzstein* and *Hadrian R. Katz.*

Briefs of *amici curiae* were filed for the Government of Australia et al. by *Mark R. Joelson* and *Joseph P. Griffin;* and for the Semiconductor Industry Association by *Joseph R. Creighton.*

Antitrust Litigation, 723 F. 2d 238 (CA3 1983); 513 F. Supp. 1100 (ED Pa. 1981). Two respected District Judges each have authored a number of opinions in this case; the published ones alone would fill an entire volume of the Federal Supplement. In addition, the parties have filed a 40-volume appendix in this Court that is said to contain the essence of the evidence on which the District Court and the Court of Appeals based their respective decisions.

We will not repeat what these many opinions have stated and restated, or summarize the mass of documents that constitute the record on appeal. Since we review only the standard applied by the Court of Appeals in deciding this case, and not the weight assigned to particular pieces of evidence, we find it unnecessary to state the facts in great detail. What follows is a summary of this case's long history.

A

Petitioners, defendants below, are 21 corporations that manufacture or sell "consumer electronic products" (CEPs)—for the most part, television sets. Petitioners include both Japanese manufacturers of CEPs and American firms, controlled by Japanese parents, that sell the Japanese-manufactured products. Respondents, plaintiffs below, are Zenith Radio Corporation (Zenith) and National Union Electric Corporation (NUE). Zenith is an American firm that manufactures and sells television sets. NUE is the corporate successor to Emerson Radio Company, an American firm that manufactured and sold television sets until 1970, when it withdrew from the market after sustaining substantial losses. Zenith and NUE began this lawsuit in 1974,[1] claiming that petitioners had illegally conspired to drive

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[1] NUE had filed its complaint four years earlier, in the District Court for the District of New Jersey. Zenith's complaint was filed separately in 1974, in the Eastern District of Pennsylvania. The two cases were consolidated in the Eastern District of Pennsylvania in 1974.

American firms from the American CEP market. According to respondents, the gist of this conspiracy was a "'scheme to raise, fix and maintain artificially *high* prices for television receivers sold by [petitioners] in Japan and, at the same time, to fix and maintain *low* prices for television receivers exported to and sold in the United States.'" 723 F. 2d, at 251 (quoting respondents' preliminary pretrial memorandum). These "low prices" were allegedly at levels that produced substantial losses for petitioners. 513 F. Supp., at 1125. The conspiracy allegedly began as early as 1953, and according to respondents was in full operation by sometime in the late 1960's. Respondents claimed that various portions of this scheme violated §§1 and 2 of the Sherman Act, §2(a) of the Robinson-Patman Act, §73 of the Wilson Tariff Act, and the Antidumping Act of 1916.

After several years of detailed discovery, petitioners filed motions for summary judgment on all claims against them. The District Court directed the parties to file, with preclusive effect, "Final Pretrial Statements" listing all the documentary evidence that would be offered if the case proceeded to trial. Respondents filed such a statement, and petitioners responded with a series of motions challenging the admissibility of respondents' evidence. In three detailed opinions, the District Court found the bulk of the evidence on which Zenith and NUE relied inadmissible.[2]

The District Court then turned to petitioners' motions for summary judgment. In an opinion spanning 217 pages, the court found that the admissible evidence did not raise a genuine issue of material fact as to the existence of the alleged conspiracy. At bottom, the court found, respondents' claims rested on the inferences that could be drawn from petitioners' parallel conduct in the Japanese and American markets, and from the effects of that conduct on petitioners' American competitors. 513 F. Supp., at 1125–1127. After reviewing the evidence both by category and *in toto*, the court found that any inference of conspiracy was unreasonable, because (i) some portions of the evidence suggested that petitioners conspired in ways that did not injure respondents, and (ii) the evidence that bore directly on the alleged price-cutting conspiracy did not rebut the more plausible inference that petitioners were cutting prices to compete in the American market and not to monopolize it. Summary judgment therefore was granted on respondents' claims under § 1 of the Sherman Act and the Wilson Tariff Act. Because the Sherman Act § 2 claims, which alleged that petitioners had combined to monopolize the American CEP market, were functionally indistinguishable from the § 1 claims, the court dismissed them also. Finally, the court found that the Robinson-Patman Act claims depended on the same supposed conspiracy as the Sherman Act claims. Since the court had found no genuine issue of fact as to the conspiracy, it entered judgment in petitioners' favor on those claims as well.[3]

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[2] The inadmissible evidence included various government records and reports, *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 505 F. Supp. 1125 (ED Pa. 1980), business documents offered pursuant to various hearsay exceptions, *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 505 F. Supp. 1190 (ED Pa. 1980), and a large portion of the expert testimony that respondents proposed to introduce. *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 505 F. Supp. 1313 (ED Pa. 1981).

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[3] The District Court ruled separately that petitioners were entitled to summary judgment on respondents' claims under the Antidumping Act of 1916. *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 494 F. Supp. 1190 (ED Pa. 1980). Respondents appealed this ruling, and the Court of Appeals reversed in a separate opinion issued the same day as the opinion concerning respondents' other claims. *In re Japanese Electronic Products Antitrust Litigation*, 723 F. 2d 319 (CA3 1983).

Petitioners ask us to review the Court of Appeals' Antidumping Act decision along with its decision on the rest of this mammoth case. The Antidumping Act claims were not, however, mentioned in the questions presented in the petition for certiorari, and they have not been independently argued by the parties. See this Court's Rule 21.1(a). We therefore decline the invitation to review the Court of Appeals' decision on those claims.

B

The Court of Appeals for the Third Circuit reversed.[4] The court began by examining the District Court's evidentiary rulings, and determined that much of the evidence excluded by the District Court was in fact admissible. 723 F. 2d, at 260–303. These evidentiary rulings are not before us. See 471 U. S. 1002 (1985) (limiting grant of certiorari).

On the merits, and based on the newly enlarged record, the court found that the District Court's summary judgment decision was improper. The court acknowledged that "there are legal limitations upon the inferences which may be drawn from circumstantial evidence," 723 F. 2d, at 304, but it found that "the legal problem . . . is different" when "there is direct evidence of concert of action." *Ibid.* Here, the court concluded, "there is both direct evidence of certain kinds of concert of action and circumstantial evidence having some tendency to suggest that other kinds of concert of action may have occurred." *Id.*, at 304–305. Thus, the court reasoned, cases concerning the limitations on inferring conspiracy from ambiguous evidence were not dispositive. *Id.*, at 305. Turning to the evidence, the court determined that a factfinder reasonably could draw the following conclusions:

> 1. The Japanese market for CEPs was characterized by oligopolistic behavior, with a small number of producers meeting regularly and exchanging information on price and other matters. *Id.*, at 307. This created the opportunity for a stable combination to raise both prices and profits in Japan. American firms could not attack such a combination because the Japanese Government imposed significant barriers to entry. *Ibid.*
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> 2. Petitioners had relatively higher fixed costs than their American counterparts, and therefore needed to

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[4] As to 3 of the 24 defendants, the Court of Appeals affirmed the entry of summary judgment. Petitioners are the 21 defendants who remain in the case.

operate at something approaching full capacity in order to make a profit. *Ibid.*

3. Petitioners' plant capacity exceeded the needs of the Japanese market. *Ibid.*

4. By formal agreements arranged in cooperation with Japan's Ministry of International Trade and Industry (MITI), petitioners fixed minimum prices for CEPs exported to the American market. *Id.*, at 310. The parties refer to these prices as the "check prices," and to the agreements that require them as the "check price agreements."

5. Petitioners agreed to distribute their products in the United States according to a "five company rule": each Japanese producer was permitted to sell only to five American distributors. *Ibid.*

6. Petitioners undercut their own check prices by a variety of rebate schemes. *Id.*, at 311. Petitioners sought to conceal these rebate schemes both from the United States Customs Service and from MITI, the former to avoid various customs regulations as well as action under the antidumping laws, and the latter to cover up petitioners' violations of the check-price agreements.

Based on inferences from the foregoing conclusions,[5] the Court of Appeals concluded that a reasonable factfinder could find a conspiracy to depress prices in the American market in order to drive out American competitors, which conspiracy was funded by excess profits obtained in the Japanese market. The court apparently did not consider whether it was as plausible to conclude that petitioners' price-cutting behavior was independent and not conspiratorial.

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[5] In addition to these inferences, the court noted that there was expert opinion evidence that petitioners' export sales "generally were at prices which produced losses, often as high as twenty-five percent on sales." 723 F. 2d, at 311. The court did not identify any direct evidence of below-cost pricing; nor did it place particularly heavy reliance on this aspect of the expert evidence. See n. 19, *infra*.

The court found it unnecessary to address petitioners' claim that they could not be held liable under the antitrust laws for conduct that was compelled by a foreign sovereign. The claim, in essence, was that because MITI required petitioners to enter into the check-price agreements, liability could not be premised on those agreements. The court concluded that this case did not present any issue of sovereign compulsion, because the check-price agreements were being used as "evidence of a low export price conspiracy" and not as an independent basis for finding antitrust liability. The court also believed it was unclear that the check prices in fact were mandated by the Japanese Government, notwithstanding a statement to that effect by MITI itself. *Id.*, at 315.

We granted certiorari to determine (i) whether the Court of Appeals applied the proper standards in evaluating the District Court's decision to grant petitioners' motion for summary judgment, and (ii) whether petitioners could be held liable under the antitrust laws for a conspiracy in part compelled by a foreign sovereign. 471 U. S. 1002 (1985). We reverse on the first issue, but do not reach the second.

II

We begin by emphasizing what respondents' claim is *not*. Respondents cannot recover antitrust damages based solely on an alleged cartelization of the Japanese market, because American antitrust laws do not regulate the competitive conditions of other nations' economies. *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 443 (CA2 1945) (L. Hand, J.); 1 P. Areeda & D. Turner, Antitrust Law ¶236d (1978).[6] Nor can respondents recover damages for any conspiracy by petitioners to charge higher than competitive prices in the American market. Such conduct would indeed violate the Sherman Act, *United States* v. *Trenton Potteries Co.*, 273 U. S. 392 (1927); *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 223 (1940), but it could not injure respondents: as petitioners' competitors, respondents stand to gain from any conspiracy to raise the market price in CEPs. Cf. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 488–489 (1977). Finally, for the same reason, respondents cannot recover for a conspiracy to impose nonprice restraints that have the effect of either raising market price or limiting output. Such restrictions, though harmful to competition, actually *benefit* competitors by making supracompetitive pricing more attractive. Thus, neither petitioners' alleged supracompetitive pricing in Japan, nor the five company rule that limited distribution in this country, nor the check prices insofar as they established minimum prices in this country, can by themselves give respondents a cognizable claim against petitioners for antitrust damages. The Court of Appeals therefore erred to the extent that it found evidence of these alleged conspiracies to be "direct evidence" of a conspiracy that injured respondents. See 723 F. 2d, at 304–305.

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[6] The Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American commerce. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 704 (1962) ("A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries"). The effect

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on which respondents rely is the artificially depressed level of prices for CEPs in the United States.

Petitioners' alleged cartelization of the Japanese market could not have caused that effect over a period of some two decades. Once petitioners decided, as respondents allege, to reduce output and raise prices in the Japanese market, they had the option of either producing fewer goods or selling more goods in other markets. The most plausible conclusion is that petitioners chose the latter option because it would be more profitable than the former. That choice does not flow from the cartelization of the Japanese market. On the contrary, were the Japanese market perfectly competitive petitioners would still have to choose whether to sell goods overseas, and would still presumably make that choice based on their profit expectations. For this reason, respondents' theory of recovery depends on proof of the asserted price-cutting conspiracy in this country.

Respondents nevertheless argue that these supposed conspiracies, if not themselves grounds for recovery of antitrust damages, are circumstantial evidence of another conspiracy that *is* cognizable: a conspiracy to monopolize the American market by means of pricing below the market level.[7] The thrust of respondents' argument is that petitioners used their monopoly profits from the Japanese market to fund a concerted campaign to price predatorily and thereby drive respondents and other American manufacturers of CEPs out of business. Once successful, according to respondents, petitioners would cartelize the American CEP market, restricting output and raising prices above the level that fair competition would produce. The resulting monopoly profits, respondents contend, would more than compensate petitioners for the losses they incurred through years of pricing below market level.

The Court of Appeals found that respondents' allegation of a horizontal conspiracy to engage in predatory pricing,[8] if proved,[9] would be a *per se* violation of § 1 of the Sherman Act. 723 F. 2d, at 306. Petitioners did not appeal from that conclusion. The issue in this case thus becomes whether respondents adduced sufficient evidence in support of their theory to survive summary judgment. We therefore examine the principles that govern the summary judgment determination.

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[7] Respondents also argue that the check prices, the five company rule, and the price fixing in Japan are all part of one large conspiracy that includes monopolization of the American market through predatory pricing. The argument is mistaken. However one decides to describe the contours of the asserted conspiracy—whether there is one conspiracy or several—respondents must show that the conspiracy caused them an injury for which the antitrust laws provide relief. *Associated General Contractors of California, Inc.* v. *Carpenters*, 459 U. S. 519, 538–540 (1983); *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 488–489 (1977); see also Note, Antitrust Standing, Antitrust Injury, and the Per Se Standard, 93 Yale L. J. 1309 (1984). That showing depends in turn on proof that petitioners conspired to price predatorily in the American market, since the other conduct involved in the alleged conspiracy cannot have caused such an injury.

[8] Throughout this opinion, we refer to the asserted conspiracy as one to price "predatorily." This term has been used chiefly in cases in which a single firm, having a dominant share of the relevant market, cuts its prices in order to force competitors out of the market, or perhaps to deter potential entrants from coming in. *E. g., Southern Pacific Communications Co.* v. *American Telephone & Telegraph Co.*, 238 U. S. App. D. C. 309, 331–336, 740 F. 2d 980, 1002–1007 (1984), cert. denied, 470 U. S. 1005

III

To survive petitioners' motion for summary judgment,[10] respondents must establish that there is a genuine issue of ma-

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(1985). In such cases, "predatory pricing" means pricing below some appropriate measure of cost. *E. g., Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F. 2d 227, 232–235 (CA1 1983); see *Utah Pie Co.* v. *Continental Baking Co.*, 386 U. S. 685, 698, 701, 702, n. 14 (1967).

There is a good deal of debate, both in the cases and in the law reviews, about what "cost" is relevant in such cases. We need not resolve this debate here, because unlike the cases cited above, this is a Sherman Act § 1 case. For purposes of this case, it is enough to note that respondents have not suffered an antitrust injury unless petitioners conspired to drive respondents out of the relevant markets by (i) pricing below the level necessary to sell their products, or (ii) pricing below some appropriate measure of cost. An agreement without these features would either leave respondents in the same position as would market forces or would actually benefit respondents by raising market prices. Respondents therefore may not complain of conspiracies that, for example, set maximum prices above market levels, or that set minimum prices at *any* level.

[9] We do not consider whether recovery should *ever* be available on a theory such as respondents' when the pricing in question is above some measure of incremental cost. See generally Areeda & Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, 88 Harv. L. Rev. 697, 709–718 (1975) (discussing cost-based test for use in § 2 cases). As a practical matter, it may be that only direct evidence of below-cost pricing is sufficient to overcome the strong inference that rational businesses would not enter into conspiracies such as this one. See Part IV–A, *infra.*

[10] Respondents argued before the District Court that petitioners had failed to carry their initial burden under Federal Rule of Civil Procedure 56(c) of demonstrating the absence of a genuine issue of material fact. See *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 157 (1970). Cf. *Catrett* v. *Johns-Manville Sales Corp.*, 244 U. S. App. D. C. 160, 756 F. 2d 181,

terial fact as to whether petitioners entered into an illegal conspiracy that caused respondents to suffer a cognizable injury. Fed. Rule Civ. Proc. 56(e);[11] *First National Bank of Arizona* v. *Cities Service Co.*, 391 U. S. 253, 288–289 (1968). This showing has two components. First, respondents must show more than a conspiracy in violation of the antitrust laws; they must show an injury to them resulting from the illegal conduct. Respondents charge petitioners with a whole host of conspiracies in restraint of trade. *Supra*, at 582–583. Except for the alleged conspiracy to monopolize the American market through predatory pricing, these alleged conspiracies could not have caused respondents to suffer an "antitrust injury," *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S., at 489, because they actually tended to benefit respondents. *Supra*, at 582–583. Therefore, unless, in context, evidence of these "other" conspiracies raises a genuine issue concerning the existence of a predatory pricing conspiracy, that evidence cannot defeat petitioners' summary judgment motion.

Second, the issue of fact must be "genuine." Fed. Rules Civ. Proc. 56(c), (e). When the moving party has carried its burden under Rule 56(c),[12] its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. See *DeLuca* v. *Atlantic Refining Co.*, 176 F. 2d 421, 423 (CA2 1949) (L. Hand, J.), cert. denied, 338 U. S. 943 (1950); 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2727 (1983); Clark, Special Prob-

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cert. granted, 474 U. S. 944 (1985). That issue was resolved in petitioners' favor, and is not before us.

[11] Rule 56(e) provides, in relevant part:

"When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

[12] See n. 10, *supra*.

lems in Drafting and Interpreting Procedural Codes and Rules, 3 Vand. L. Rev. 493, 504–505 (1950). Cf. *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620, 627 (1944). In the language of the Rule, the nonmoving party must come forward with "specific facts showing that there is a *genuine issue for trial.*" Fed. Rule Civ. Proc. 56(e) (emphasis added). See also Advisory Committee Note to 1963 Amendment of Fed. Rule Civ. Proc. 56(e), 28 U. S. C. App., p. 626 (purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial"). Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial." *Cities Service, supra,* at 289.

It follows from these settled principles that if the factual context renders respondents' claim implausible—if the claim is one that simply makes no economic sense—respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary. *Cities Service* is instructive. The issue in that case was whether proof of the defendant's refusal to deal with the plaintiff supported an inference that the defendant willingly had joined an illegal boycott. Economic factors strongly suggested that the defendant had no motive to join the alleged conspiracy. 391 U. S., at 278–279. The Court acknowledged that, in isolation, the defendant's refusal to deal might well have sufficed to create a triable issue. *Id.*, at 277. But the refusal to deal had to be evaluated in its factual context. Since the defendant lacked any rational motive to join the alleged boycott, and since its refusal to deal was consistent with the defendant's independent interest, the refusal to deal could not by itself support a finding of antitrust liability. *Id.*, at 280.

Respondents correctly note that "[o]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *United States* v. *Diebold, Inc.*, 369

U. S. 654, 655 (1962). But antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. Thus, in *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U. S. 752 (1984), we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. *Id.*, at 764. See also *Cities Service, supra*, at 280. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. 465 U. S., at 764. Respondents in this case, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents. See *Cities Service, supra*, at 280.

Petitioners argue that these principles apply fully to this case. According to petitioners, the alleged conspiracy is one that is economically irrational and practically infeasible. Consequently, petitioners contend, they had no motive to engage in the alleged predatory pricing conspiracy; indeed, they had a strong motive *not* to conspire in the manner respondents allege. Petitioners argue that, in light of the absence of any apparent motive and the ambiguous nature of the evidence of conspiracy, no trier of fact reasonably could find that the conspiracy with which petitioners are charged actually existed. This argument requires us to consider the nature of the alleged conspiracy and the practical obstacles to its implementation.

IV

A

A predatory pricing conspiracy is by nature speculative. Any agreement to price below the competitive level requires the conspirators to forgo profits that free competition would offer them. The forgone profits may be considered an investment in the future. For the investment to be rational, the conspirators must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered. As then-Professor Bork, discussing predatory pricing by a single firm, explained:

> "Any realistic theory of predation recognizes that the predator as well as his victims will incur losses during the fighting, but such a theory supposes it may be a rational calculation for the predator to view the losses as an investment in future monopoly profits (where rivals are to be killed) or in future undisturbed profits (where rivals are to be disciplined). The future flow of profits, appropriately discounted, must then exceed the present size of the losses." R. Bork, The Antitrust Paradox 145 (1978).

See also McGee, Predatory Pricing Revisited, 23 J. Law & Econ. 289, 295–297 (1980). As this explanation shows, the success of such schemes is inherently uncertain: the short-run loss is definite, but the long-run gain depends on successfully neutralizing the competition. Moreover, it is not enough simply to achieve monopoly power, as monopoly pricing may breed quick entry by new competitors eager to share in the excess profits. The success of any predatory scheme depends on *maintaining* monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain. Absent some assurance that the hoped-for monopoly will materialize, *and* that it can be sustained for a significant period of time, "[t]he predator must make a substantial investment with no assurance that it will pay off." Easterbrook, Predatory Strategies and Counterstrategies, 48 U. Chi. L. Rev. 263, 268 (1981). For this reason, there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful. See, *e. g.*, Bork, *supra,* at 149–155; Areeda & Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, 88 Harv. L. Rev. 697, 699 (1975); Easterbrook, *supra;* Koller, The Myth of Predatory Pricing—An Empirical Study, 4 Antitrust Law & Econ. Rev. 105 (1971); McGee, Predatory Price Cutting: The *Standard Oil (N. J.) Case,* 1 J. Law & Econ. 137 (1958); McGee, Predatory Pricing Revisited, 23 J. Law & Econ., at 292–294. See also *Northeastern Telephone Co.* v. *American Telephone & Telegraph Co.*, 651 F. 2d 76, 88 (CA2 1981) ("[N]owhere in the recent outpouring of literature on the subject do commentators suggest that [predatory] pricing is either common or likely to increase"), cert. denied, 455 U. S. 943 (1982).

These observations apply even to predatory pricing by a *single firm* seeking monopoly power. In this case, respondents allege that a large number of firms have conspired over a period of many years to charge below-market prices in order to stifle competition. Such a conspiracy is incalculably more difficult to execute than an analogous plan undertaken by a single predator. The conspirators must allocate the losses to be sustained during the conspiracy's operation, and must also allocate any gains to be realized from its success. Precisely because success is speculative and depends on a willingness to endure losses for an indefinite period, each conspirator has a strong incentive to cheat, letting its partners suffer the losses necessary to destroy the competition while sharing in any gains if the conspiracy succeeds. The necessary allocation is therefore difficult to accomplish. Yet if conspirators cheat to any substantial extent, the conspiracy must fail, because its success depends on depressing the market price for *all* buyers of CEPs. If there are too few goods at the artificially low price to satisfy demand, the would-be victims of the conspiracy can continue to sell at the "real" market price, and the conspirators suffer losses to little purpose.

Finally, if predatory pricing conspiracies are generally unlikely to occur, they are especially so where, as here, the prospects of attaining monopoly power seem slight. In order to recoup their losses, petitioners must obtain enough market power to set higher than competitive prices, and then must sustain those prices long enough to earn in excess profits what they earlier gave up in below-cost prices. See *Northeastern Telephone Co.* v. *American Telephone & Telegraph Co., supra,* at 89; Areeda & Turner, 88 Harv. L. Rev., at 698. Two decades after their conspiracy is alleged to have commenced,[13] petitioners appear to be far from achieving this goal: the two largest shares of the retail market in television sets are held by RCA and respondent Zenith, not by any of petitioners. 6 App. to Brief for Appellant in No. 81–2331 (CA3), pp. 2575a-2576a. Moreover, those shares, which together approximate 40% of sales, did not decline appreciably during the 1970's. *Ibid.* Petitioners' collective share rose rapidly during this period, from one-fifth or less of the relevant markets to close to 50%. 723 F. 2d, at 316.[14] Neither the District Court nor the Court of Appeals found, however, that petitioners' share presently allows them to charge monopoly prices; to the contrary, respondents contend that the conspiracy is ongoing—that petitioners are still artificially *depressing* the market price in order to drive Zenith out of the market. The data in the record strongly suggest that that goal is yet far distant.[15]

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[13] NUE's complaint alleges that petitioners' conspiracy began as early as 1960; the starting date used in Zenith's complaint is 1953. NUE Complaint ¶ 52; Zenith Complaint ¶ 39.

[14] During the same period, the number of American firms manufacturing television sets declined from 19 to 13. 5 App. to Brief for Appellant in No. 81–2331 (CA3), p. 1961a. This decline continued a trend that began at least by 1960, when petitioners' sales in the United States market were negligible. *Ibid.* See Zenith Complaint ¶¶ 35, 37.

[15] Respondents offer no reason to suppose that entry into the relevant market is especially difficult, yet without barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time. Judge Easterbrook, commenting on this case in a law review article, offers the following sensible assessment:

"The plaintiffs [in this case] maintain that for the last fifteen years or more at least ten Japanese manufacturers have sold TV sets at less than cost in order to drive United States firms out of business. Such conduct cannot possibly produce profits by harming competition, however. If the Japanese firms drive some United States firms out of business, they could not

The alleged conspiracy's failure to achieve its ends in the two decades of its asserted operation is strong evidence that the conspiracy does not in fact exist. Since the losses in such a conspiracy accrue before the gains, they must be "repaid" with interest. And because the alleged losses have accrued over the course of two decades, the conspirators could well require a correspondingly long time to recoup. Maintaining supracompetitive prices in turn depends on the continued cooperation of the conspirators, on the inability of other would-be competitors to enter the market, and (not incidentally) on the conspirators' ability to escape antitrust liability for their *minimum* price-fixing cartel.[16] Each of these factors weighs more heavily as the time needed to recoup losses grows. If the losses have been substantial—as would likely be neces-

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recoup. Fifteen years of losses could be made up only by very high prices for the indefinite future. (The losses are like investments, which must be recovered with compound interest.) If the defendants should try to raise prices to such a level, they would attract new competition. There are no barriers to entry into electronics, as the proliferation of computer and audio firms shows. The competition would come from resurgent United States firms, from other foreign firms (Korea and many other nations make TV sets), and from defendants themselves. In order to recoup, the Japanese firms would need to suppress competition among themselves. On plaintiffs' theory, the cartel would need to last at least thirty years, far longer than any in history, even when cartels were not illegal. None should be sanguine about the prospects of such a cartel, given each firm's incentive to shave price and expand its share of sales. The predation recoupment story therefore does not make sense, and we are left with the more plausible inference that the Japanese firms did not sell below cost in the first place. They were just engaged in hard competition." Easterbrook, The Limits of Antitrust, 63 Texas L. Rev. 1, 26–27 (1984) (footnotes omitted).

[16] The alleged predatory scheme makes sense only if petitioners can recoup their losses. In light of the large number of firms involved here, petitioners can achieve this only by engaging in some form of price fixing *after* they have succeeded in driving competitors from the market. Such price fixing would, of course, be an independent violation of § 1 of the Sherman Act. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940).

sary in order to drive out the competition[17]—petitioners would most likely have to sustain their cartel for years simply to break even.

Nor does the possibility that petitioners have obtained supracompetitive profits in the Japanese market change this calculation. Whether or not petitioners have the *means* to sustain substantial losses in this country over a long period of time, they have no *motive* to sustain such losses absent some strong likelihood that the alleged conspiracy in this country will eventually pay off. The courts below found no evidence of any such success, and—as indicated above—the facts actually are to the contrary: RCA and Zenith, not any of the petitioners, continue to hold the largest share of the American retail market in color television sets. More important, there is nothing to suggest any relationship between petitioners' profits in Japan and the amount petitioners could expect to gain from a conspiracy to monopolize the American market. In the absence of any such evidence, the possible existence of supracompetitive profits in Japan simply cannot overcome the economic obstacles to the ultimate success of this alleged predatory conspiracy.[18]

B

In *Monsanto,* we emphasized that courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct. *Monsanto,* 465 U. S., at 762–764.

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[17] The predators' losses must actually *increase* as the conspiracy nears its objective: the greater the predators' market share, the more products the predators sell; but since every sale brings with it a loss, an increase in market share also means an increase in predatory losses.

[18] The same is true of any supposed excess production capacity that petitioners may have possessed. The existence of plant capacity that exceeds domestic demand does tend to establish the ability to sell products abroad. It does not, however, provide a motive for selling at prices lower than necessary to obtain sales; nor does it explain why petitioners would be willing to *lose* money in the United States market without some reasonable prospect of recouping their investment.

Respondents, petitioners' competitors, seek to hold petitioners liable for damages caused by the alleged conspiracy to cut prices. Moreover, they seek to establish this conspiracy indirectly, through evidence of other combinations (such as the check-price agreements and the five company rule) whose natural tendency is to raise prices, and through evidence of rebates and other price-cutting activities that respondents argue tend to prove a combination to suppress prices.[19] But cutting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect. See *Monsanto, supra,* at 763–764. "[W]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition." *Barry Wright Corp.* v. *ITT Grinnell Corp.,* 724 F. 2d 227, 234 (CA1 1983).

In most cases, this concern must be balanced against the desire that illegal conspiracies be identified and punished. That balance is, however, unusually one-sided in cases such as this one. As we earlier explained, *supra,* at 588–593, predatory pricing schemes require conspirators to suffer losses in order eventually to realize their illegal gains; moreover, the gains depend on a host of uncertainties, making such schemes more likely to fail than to succeed. These economic realities tend to make predatory pricing conspiracies self-deterring: unlike most other conduct that violates the antitrust laws, failed predatory pricing schemes are costly to the conspirators. See Easterbrook, The Limits of Antitrust, 63 Texas L. Rev. 1, 26 (1984). Finally, unlike predatory pricing by a single firm, *successful* predatory pricing conspiracies involving a large number of firms can be identified and punished once they succeed, since some form of minimum price-fixing agreement would be necessary in order to reap the benefits of predation. Thus, there is little reason to be concerned that by granting summary judgment in cases where the evidence of conspiracy is speculative or ambiguous, courts will encourage such conspiracies.

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[19] Respondents also rely on an expert study suggesting that petitioners have sold their products in the American market at substantial losses. The relevant study is not based on actual cost data; rather, it consists of expert opinion based on a mathematical construction that in turn rests on assumptions about petitioners' costs. The District Court analyzed those assumptions in some detail and found them both implausible and inconsistent with record evidence. *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.,* 505 F. Supp., at 1356–1363. Although the Court of Appeals reversed the District Court's finding that the expert report was inadmissible, the court did not disturb the District Court's analysis of the factors that substantially undermine the probative value of that evidence. See 723 F. 2d, at 277–282. We find the District Court's analysis persuasive. Accordingly, in our view the expert opinion evidence of below-cost pricing has little probative value in comparison with the economic factors, discussed in Part IV–A, *supra,* that suggest that such conduct is irrational.

V

As our discussion in Part IV–A shows, petitioners had no motive to enter into the alleged conspiracy. To the contrary, as presumably rational businesses, petitioners had every incentive *not* to engage in the conduct with which they are charged, for its likely effect would be to generate losses for petitioners with no corresponding gains. Cf. *Cities Service*, 391 U. S., at 279. The Court of Appeals did not take account of the absence of a plausible motive to enter into the alleged predatory pricing conspiracy. It focused instead on whether there was "direct evidence of concert of action." 723 F. 2d, at 304. The Court of Appeals erred in two respects: (i) the "direct evidence" on which the court relied had little, if any, relevance to the alleged predatory pricing conspiracy; and (ii) the court failed to consider the absence of a plausible motive to engage in predatory pricing.

The "direct evidence" on which the court relied was evidence of *other* combinations, not of a predatory pricing conspiracy. Evidence that petitioners conspired to raise prices in Japan provides little, if any, support for respondents' claims: a conspiracy to increase profits in one market does not tend to show a conspiracy to sustain losses in another. Evidence that petitioners agreed to fix *minimum* prices (through the check-price agreements) for the American market actually works in petitioners' favor, because it suggests that petitioners were seeking to place a floor under prices rather than to lower them. The same is true of evidence that petitioners agreed to limit the number of distributors of their products in the American market—the so-called five company rule. That practice may have facilitated a horizontal territorial allocation, see *United States* v. *Topco Associates*, *Inc.*, 405 U. S. 596 (1972), but its natural effect would be to raise market prices rather than reduce them.[20] Evidence that tends to support any of these collateral conspiracies thus says little, if anything, about the existence of a conspiracy to charge below-market prices in the American market over a period of two decades.

That being the case, the absence of any plausible motive to engage in the conduct charged is highly relevant to whether a "genuine issue for trial" exists within the meaning of Rule 56(e). Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy. See *Cities Service, supra,* at 278–280. Here, the conduct in question consists largely of (i) pricing at levels that succeeded in taking business away from respondents, and (ii) arrangements that may have limited petitioners' ability to compete with each other (and thus kept prices from going even lower). This conduct suggests either that petitioners behaved competitively, or that petitioners conspired to *raise* prices. Neither possibility is consistent with an agreement among 21 companies to price below market levels. Moreover, the predatory pricing scheme that this conduct is said to prove is one that makes no practical sense: it calls for petitioners to destroy companies larger and better established than themselves, a goal that remains far distant more than two decades after the conspiracy's birth. Even had they succeeded in obtaining their monopoly, there is nothing in the record to suggest that they could recover the losses they would need to sustain along the way. In sum, in light of the absence of any rational motive to conspire, neither petitioners' pricing practices, nor their conduct in the Japanese market, nor their agreements respecting prices and distribution in the American market, suffice to create a "genuine issue for trial." Fed. Rule Civ. Proc. 56(e).[21]

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[20] The Court of Appeals correctly reasoned that the five company rule might tend to insulate petitioners from competition with each other. 723 F. 2d, at 306. But this effect is irrelevant to a conspiracy to price predatorily. Petitioners have no incentive to underprice each other if they already are pricing *below* the level at which they could sell their goods. The far more plausible inference from a customer allocation agreement such as the five company rule is that petitioners were conspiring to *raise* prices, by limiting their ability to take sales away from each other. Respondents—petitioners' competitors—suffer no harm from a conspiracy to raise prices. *Supra*, at 582–583. Moreover, it seems very unlikely that the five company rule had any significant effect of any kind, since the "rule" permitted petitioners to sell to their American subsidiaries, and did not limit the number of distributors to which the subsidiaries could resell. 513 F. Supp., at 1190.

On remand, the Court of Appeals is free to consider whether there is other evidence that is sufficiently unambiguous to permit a trier of fact to find that petitioners conspired to price predatorily for two decades despite the absence of any apparent motive to do so. The evidence must "ten[d] to exclude the possibility" that petitioners underpriced respondents to compete for business rather than to implement an economically senseless conspiracy. *Monsanto*, 465 U. S., at 764. In the absence of such evidence, there is no "genuine issue for trial" under Rule 56(e), and petitioners are entitled to have summary judgment reinstated.

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[21] We do not imply that, if petitioners had had a plausible reason to conspire, ambiguous conduct could suffice to create a triable issue of conspiracy. Our decision in *Monsanto Co.* v. *Spray-Rite Service Corp.,* 465 U. S. 752 (1984), establishes that conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy. *Id.,* at 763–764. See *supra,* at 588.

VI

Our decision makes it unnecessary to reach the sovereign compulsion issue. The heart of petitioners' argument on that issue is that MITI, an agency of the Government of Japan, required petitioners to fix minimum prices for export to the United States, and that petitioners are therefore immune from antitrust liability for any scheme of which those minimum prices were an integral part. As we discussed in Part II, *supra*, respondents could not have suffered a cognizable injury from any action that *raised* prices in the American CEP market. If liable at all, petitioners are liable for conduct that is distinct from the check-price agreements. The sovereign compulsion question that both petitioners and the Solicitor General urge us to decide thus is not presented here.

The decision of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE WHITE, with whom JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

It is indeed remarkable that the Court, in the face of the long and careful opinion of the Court of Appeals, reaches the result it does. The Court of Appeals faithfully followed the relevant precedents, including *First National Bank of Arizona* v. *Cities Service Co.*, 391 U. S. 253 (1968), and *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U. S. 752 (1984), and it kept firmly in mind the principle that proof of a conspiracy should not be fragmented, see *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 699 (1962). After surveying the massive record, including very significant evidence that the District Court erroneously had excluded, the Court of Appeals concluded that the evidence taken as a whole creates a genuine issue of fact whether petitioners engaged in a conspiracy in violation of §§ 1 and 2 of the Sherman Act and § 2(a) of the Robinson-Patman Act. In my view, the Court of Appeals' opinion more than adequately supports this judgment.

The Court's opinion today, far from identifying reversible error, only muddies the waters. In the first place, the Court makes confusing and inconsistent statements about the appropriate standard for granting summary judgment. Second, the Court makes a number of assumptions that invade the factfinder's province. Third, the Court faults the Third Circuit for nonexistent errors and remands the case although it is plain that respondents' evidence raises genuine issues of material fact.

I

The Court's initial discussion of summary judgment standards appears consistent with settled doctrine. I agree that "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Ante*, at 587 (quoting *Cities Service, supra*, at 289). I also agree that "'[o]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.'" *Ante*, at 587 (quoting *United States* v. *Diebold, Inc.*, 369 U. S. 654, 655 (1962)). But other language in the Court's opinion suggests a departure from traditional summary judgment doctrine. Thus, the Court gives the following critique of the Third Circuit's opinion:

> "[T]he Court of Appeals concluded that a reasonable factfinder could find a conspiracy to depress prices in the American market in order to drive out American competitors, which conspiracy was funded by excess profits obtained in the Japanese market. The court apparently did not consider whether it was as plausible to conclude

> that petitioners' price-cutting behavior was independent and not conspiratorial." *Ante*, at 581.

In a similar vein, the Court summarizes *Monsanto Co.* v. *Spray-Rite Service Corp.*, *supra*, as holding that "courts should not permit factfinders to infer conspiracies when such inferences are implausible . . . ." *Ante*, at 593. Such language suggests that a judge hearing a defendant's motion for summary judgment in an antitrust case should go beyond the traditional summary judgment inquiry and decide for himself whether the weight of the evidence favors the plaintiff. *Cities Service* and *Monsanto* do not stand for any such proposition. Each of those cases simply held that a particular piece of evidence standing alone was insufficiently probative to justify sending a case to the jury.[1] These holdings in no way undermine the doctrine that all evidence must be construed in the light most favorable to the party opposing summary judgment.

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[1] The Court adequately summarizes the quite fact-specific holding in *Cities Service*. *Ante*, at 587.

In *Monsanto*, the Court held that a manufacturer's termination of a price-cutting distributor after receiving a complaint from another distributor is not, *standing alone*, sufficient to create a jury question. 465 U. S., at 763–764. To understand this holding, it is important to realize that under *United States* v. *Colgate & Co.*, 250 U. S. 300 (1919), it is permissible for a manufacturer to announce retail prices in advance and terminate those who fail to comply, but that under *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373 (1911), it is impermissible for the manufacturer and its distributors to agree on the price at which the distributors will sell the goods. Thus, a manufacturer's termination of a price-cutting distributor after receiving a complaint from another distributor is lawful under *Colgate*, *unless* the termination is pursuant to a shared understanding between the manufacturer and its distributors respecting enforcement of a resale price maintenance scheme. *Monsanto* holds that to establish liability under *Dr. Miles*, more is needed than evidence of behavior that is consistent with a distributor's exercise of its prerogatives under *Colgate*. Thus, "[t]here must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." 465 U. S., at 764. *Monsanto* does *not* hold that if a terminated dealer produces some further evidence of conspiracy beyond the bare fact of postcomplaint termination, the judge hearing a motion for summary judgment should balance all the evidence pointing toward conspiracy against all the evidence pointing toward independent action.

If the Court intends to give every judge hearing a motion for summary judgment in an antitrust case the job of determining if the evidence makes the inference of conspiracy more probable than not, it is overturning settled law. If the Court does not intend such a pronouncement, it should refrain from using unnecessarily broad and confusing language.

II

In defining what respondents must show in order to recover, the Court makes assumptions that invade the factfinder's province. The Court states with very little discussion that respondents can recover under § 1 of the Sherman Act only if they prove that "petitioners conspired to drive respondents out of the relevant markets by (i) pricing below the level necessary to sell their products, or (ii) pricing below some appropriate measure of cost." *Ante,* at 585, n. 8. This statement is premised on the assumption that "[a]n agreement without these features would either leave respondents in the same position as would market forces or would actually benefit respondents by raising market prices." *Ibid.* In making this assumption, the Court ignores the contrary conclusions of respondents' expert DePodwin, whose report in very relevant part was erroneously excluded by the District Court.

The DePodwin Report, on which the Court of Appeals relied along with other material, indicates that respondents were harmed in two ways that are independent of whether petitioners priced their products below "the level necessary to sell their products or . . . some appropriate measure of cost." *Ibid.* First, the Report explains that the price-raising scheme in Japan resulted in lower consumption of petitioners' goods in that country and the exporting of more of petitioners' goods to this country than would have occurred had prices in Japan been at the competitive level. Increasing exports to this country resulted in depressed prices here, which harmed respondents.[2] Second, the DePodwin Report indicates that petitioners exchanged confidential proprietary information and entered into agreements such as the five company rule with the goal of avoiding intragroup competition in the United States market. The Report explains that petitioners' restrictions on intragroup competition caused respondents to lose business that they would not have lost had petitioners competed with one another.[3]

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[2] Dr. DePodwin summarizes his view of the harm caused by Japanese cartelization as follows:

"When we consider the injuries inflicted on United States producers, we must again look at the Japanese television manufacturers' export agreement as part of a generally collusive scheme embracing the Japanese domestic market as well. This scheme increased the supply of television receivers to the United States market while restricting supply in the Japanese market. If Japanese manufacturers had competed in both domestic and export markets, they would have sold more in the domestic market and less in the United States. A greater proportion of Japanese production capacity would have been devoted to domestic sales. Domestic prices would have been lower and export prices would have been higher. The size of the price differential between domestic and export markets would have diminished practically to the vanishing point. Consequently, competition among Japanese producers in both markets would have resulted in reducing exports to the United States and United States prices would have risen. In addition, investment by the United States industry would have increased. As it was, however, the influx of sets at depressed prices cut the rates of return on television receiver production facilities in the United States to so low a level as to make such investment uneconomic.

"We can therefore conclude that the American manufacturers of television receivers would have made larger sales at higher prices in the absence of the Japanese cartel agreements. Thus, the collusive behavior of Japanese television manufacturers resulted in a very severe injury to those American television manufacturers, particularly to National Union Electric Corporation, which produced a preponderance of television sets with screen sizes of nineteen inches and lower, especially those in the lower range of prices." 5 App. to Brief for Appellants in No. 81-2331 (CA3), pp. 1629a-1630a.

[3] The DePodwin Report has this, among other things, to say in summarizing the harm to respondents caused by the five company rule, ex-

The DePodwin Report alone creates a genuine factual issue regarding the harm to respondents caused by Japanese cartelization and by agreements restricting competition among petitioners in this country. No doubt the Court prefers its own economic theorizing to Dr. DePodwin's, but that is not a reason to deny the factfinder an opportunity to consider Dr. DePodwin's views on how petitioners' alleged collusion harmed respondents.[4]

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change of production data, price coordination, and other allegedly anticompetitive practices of petitioners:

"The impact of Japanese anti-competitive practices on United States manufacturers is evident when one considers the nature of competition. When a market is fully competitive, firms pit their resources against one another in an attempt to secure the business of individual customers. However, when firms collude, they violate a basic tenet of competitive behavior, i. e., that they act independently. United States firms were confronted with Japanese competitors who collusively were seeking to destroy their established customer relationships. Each Japanese company had targeted customers which it could service with reasonable assurance that its fellow Japanese cartel members would not become involved. But just as importantly, each Japanese firm would be assured that what was already a low price level for Japanese television receivers in the United States market would not be further depressed by the actions of its Japanese associates.

"The result was a phenomenal growth in exports, particularly to the United States. Concurrently, Japanese manufacturers, and the defendants in particular, made large investments in new plant and equipment and expanded production capacity. It is obvious, therefore, that the effect of the Japanese cartel's concerted actions was to generate a larger volume of investment in the Japanese television industry than would otherwise have been the case. This added capacity both enabled and encouraged the Japanese to penetrate the United States market more deeply than they would have had they competed lawfully." *Id.*, at 1628a–1629a.

For a more complete statement of DePodwin's explanation of how the alleged cartel operated, and the harms it caused respondents, see *id.*, at 1609a–1642a. This material is summarized in a chart found *id.*, at 1633a.

[4] In holding that Parts IV and V of the Report had been improperly excluded, the Court of Appeals said:

"The trial court found that DePodwin did not use economic expertise in reaching the opinion that the defendants participated in a Japanese televi-

The Court, in discussing the unlikelihood of a predatory conspiracy, also consistently assumes that petitioners valued profit-maximization over growth. See, *e. g.*, *ante*, at 595. In light of the evidence that petitioners sold their goods in this country at substantial losses over a long period of time, see Part III–B, *infra*, I believe that this is an assumption that should be argued to the factfinder, not decided by the Court.

III

In reversing the Third Circuit's judgment, the Court identifies two alleged errors: "(i) [T]he 'direct evidence' on which the [Court of Appeals] relied had little, if any, relevance to the alleged predatory pricing conspiracy; and (ii) the court failed to consider the absence of a plausible motive to engage in predatory pricing." *Ante*, at 595. The Court's position is without substance.

A

The first claim of error is that the Third Circuit treated evidence regarding price fixing in Japan and the so-called five company rule and check prices as "'direct evidence' of a conspiracy that injured respondents." *Ante*, at 583 (citing *In re Japanese Electronics Products Antitrust Litigation*, 723 F. 2d 238, 304–305 (1983)). The passage from the Third

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sion cartel. 505 F. Supp. at 1342–46. We have examined the excluded portions of Parts IV and V in light of the admitted portions, and we conclude that this finding is clearly erroneous. As a result, the court also held the opinions to be unhelpful to the factfinder. What the court in effect did was to eliminate all parts of the report in which the expert economist, after describing the conditions in the respective markets, the opportunities for collusion, the evidence pointing to collusion, the terms of certain undisputed agreements, and the market behavior, expressed the opinion that there was concert of action consistent with plaintiffs' conspiracy theory. Considering the complexity of the economic issues involved, it simply cannot be said that such an opinion would not help the trier of fact to understand the evidence or determine that fact in issue." *In re Japanese Electronics Products Antitrust Litigation*, 723 F. 2d 238, 280 (1983).

The Court of Appeals had similar views about Parts VI and VII.

Circuit's opinion in which the Court locates this alleged error makes what I consider to be a quite simple and correct observation, namely, that this case is distinguishable from traditional "conscious parallelism" cases, in that there is direct evidence of concert of action among petitioners. *Ibid.* The Third Circuit did not, as the Court implies, jump unthinkingly from this observation to the conclusion that evidence regarding the five company rule could support a finding of antitrust injury to respondents.[5] The Third Circuit twice specifically noted that horizontal agreements allocating customers, though illegal, do not ordinarily injure competitors of the agreeing parties. *Id.*, at 306, 310–311. However, after reviewing evidence of cartel activity in Japan, collusive establishment of dumping prices in this country, and long-term, below-cost sales, the Third Circuit held that a factfinder could reasonably conclude that the five company rule was not a simple price-raising device:

> "[A] factfinder might reasonably infer that the allocation of customers in the United States, combined with price-fixing in Japan, was intended to permit concentration of the effects of dumping upon American competitors while eliminating competition among the Japanese manufacturers in either market." *Id.*, at 311.

I see nothing erroneous in this reasoning.

B

The Court's second charge of error is that the Third Circuit was not sufficiently skeptical of respondents' allegation that petitioners engaged in predatory pricing conspiracy. But the Third Circuit is not required to engage in academic discussions about predation; it is required to decide whether respondents' evidence creates a genuine issue of material fact. The Third Circuit did its job, and remanding the case so that it can do the same job again is simply pointless.

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[5] I use the Third Circuit's analysis of the five company rule by way of example; the court did an equally careful analysis of the parts the cartel activity in Japan and the check prices could have played in an actionable conspiracy. See generally *id.*, at 303–311.

In discussing the five-company rule, I do not mean to imply any conclusion on the validity of petitioners' sovereign compulsion defense. Since the Court does not reach this issue, I see no need of my addressing it.

The Third Circuit indicated that it considers respondents' evidence sufficient to create a genuine factual issue regarding long-term, below-cost sales by petitioners. *Ibid.* The Court tries to whittle away at this conclusion by suggesting that the "expert opinion evidence of below-cost pricing has little probative value in comparison with the economic factors . . . that suggest that such conduct is irrational." *Ante*, at 594, n. 19. But the question is not whether the Court finds respondents' experts persuasive, or prefers the District Court's analysis; it is whether, viewing the evidence in the light most favorable to respondents, a jury or other factfinder could reasonably conclude that petitioners engaged in long-term, below-cost sales. I agree with the Third Circuit that the answer to this question is "yes."

It is misleading for the Court to state that the Court of Appeals "did not disturb the District Court's analysis of the factors that substantially undermine the probative value of [evidence in the DePodwin Report respecting below-cost sales]." *Ibid.* The Third Circuit held that the exclusion of the portion of the DePodwin Report regarding below-cost pricing was erroneous because "the trial court ignored DePodwin's uncontradicted affidavit that all data relied on in his report were of the type on which experts in his field would reasonably rely." 723 F. 2d, at 282. In short, the Third Circuit found DePodwin's affidavit sufficient to create a genuine factual issue regarding the correctness of his conclusion that petitioners sold below cost over a long period of time. Having made this determination, the court saw no need—nor do I—to address the District Court's analysis point by point. The District Court's criticisms of De-

Podwin's methods are arguments that a factfinder should consider.

IV

Because I believe that the Third Circuit was correct in holding that respondents have demonstrated the existence of genuine issues of material fact, I would affirm the judgment below and remand this case for trial.

GOLDEN STATE TRANSIT CORP. *v.* CITY OF LOS ANGELES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84–1644. Argued December 4, 1985—Decided April 1, 1986

While petitioner's application to renew its franchise to operate taxicabs in respondent city of Los Angeles was pending, petitioner's drivers went on strike. The City Council then conditioned renewal of the franchise on settlement of the labor dispute by a certain date. When the dispute was not settled by that date, the franchise expired. Petitioner filed suit in Federal District Court, alleging, *inter alia*, that the city's action was pre-empted by the National Labor Relations Act (NLRA). The District Court granted summary judgment for the city, and the Court of Appeals affirmed.

Held: The city's action in conditioning petitioner's franchise renewal on the settlement of the labor dispute is pre-empted by the NLRA. Pp. 613–620.

(a) The NLRA pre-emption principle precluding state and municipal regulation concerning conduct that Congress intended to be unregulated, *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S. 132, is applicable here. Under this principle, States and municipalities are prohibited from imposing restrictions on economic weapons of self-help, unless such restrictions were contemplated by Congress. Pp. 613–615.

(b) Both the language of the NLRA and its legislative history demonstrate that the city's action contravened congressional intent. Pp. 615–619.

(c) The settlement condition imposed by the City Council destroyed the balance of power designed by Congress in the NLRA, and frustrated Congress' decision to leave open the use of economic weapons. Pp. 619–620.

754 F. 2d 830, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, POWELL, STEVENS, and O'CONNOR, JJ., joined. REHNQUIST, J., filed a dissenting opinion, *post*, p. 620.

Zachary D. Fasman argued the cause for petitioner. With him on the briefs was *Clifton S. Elgarten*.

John F. Haggerty argued the cause and filed a brief for respondent.*

JUSTICE BLACKMUN delivered the opinion of the Court.

The city of Los Angeles, Cal., refused to renew Golden State Transit Corporation's taxicab franchise after the company's drivers went on strike. We are asked to decide whether, under *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S. 132 (1976), the city's action is preempted by the National Labor Relations Act (NLRA), 29 U. S. C. § 151 *et seq.*

I

In 1980, Golden State, which operated taxicabs under the Yellow Cab name, applied to the city for a renewal of its operating franchise eventually scheduled to lapse on March 31, 1981. That franchise had first been acquired in 1977. On September 4, 1980, the city's Board of Transportation Commissioners recommended the renewal of Golden State's franchise—the largest, with approximately 400 cabs, of companies operating in Los Angeles—along with the franchises of 12 other taxi companies.

In October, while the franchise renewal application was pending, Golden State's labor contract with its drivers expired. The company and the drivers, represented by Local

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**Peter G. Nash, Dixie L. Atwater,* and *Stephen A. Bokat* filed a brief for the Chamber of Commerce of the United States as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the National League of Cities et al. by *Rex E. Lee, Benjamin W. Heineman, Jr., Carter G. Phillips, Benna Ruth Solomon,* and *Joyce Holmes Benjamin;* and for the National Institute of Municipal Law Officers by *George Agnost, Roy D. Bates, Benjamin L. Brown, J. Lamar Shelley, John W. Witt,* and *Roger F. Cutler.*

Briefs of *amici curiae* were filed for the National Labor Relations Board by *Acting Solicitor General Fried, Deputy Solicitor General Wallace, Bruce N. Kuhlik, Norton J. Come, Linda Sher,* and *Robert C. Bell, Jr.;* and for the American Federation of Labor and Congress of Industrial Organizations by *David Silberman* and *Laurence Gold.*

572 of the International Brotherhood of Teamsters, signed a short-term contract in order that operations would continue while negotiation and mediation proceeded. This interim contract was to expire at midnight February 10, 1981, the day before the City Council was scheduled to consider action on the franchise renewals.

On February 2, the Council's Transportation and Traffic Committee endorsed franchise renewals recommended by the Board of Transportation Commissioners. The Committee's report stated that Golden State and other companies were "in compliance with all terms and conditions of their franchise[s]." App. 39.

On February 11, the drivers struck Golden State, halting its operations. At the Council meeting that day, Teamster representatives argued against renewal of Golden State's franchise because of the pendency of the labor dispute. The Council postponed decision on Golden State's application until February 17, but, with possibly one exception, approved all other franchise renewal applications. At the February 17 meeting, when the union again opposed the renewal, the Council voted to extend Golden State's franchise from March 31 to April 30, but only if the Council expressly found, on or before March 27, that the extension was in the best interests of the city.

At its March 23 meeting, the Council held a short public hearing on whether it should grant the limited extension. By this time, the labor dispute and the franchise renewal issue had become clearly intertwined. The Teamsters opposed any extension of the Yellow Cab franchise, stating that such action would simply lengthen the strike and keep the drivers out of work. It preferred to see the franchise terminated, and to have the drivers seek jobs from Golden State's successor or from other franchise holders. As others spoke, the discussion turned to whether there was even a need for Yellow Cab, in light of the services performed by the other 12 franchised taxi companies. There were comments regarding an excess of cabs; the city's policy at the time, however, was not to limit the number of taxi companies or the number of taxis in each fleet. *Id.*, at 81–82.

The strike was central to the discussion. One Council member charged Golden State with negotiating unreasonably, *id.*, at 71, while another accused the company of trying to "brea[k] the back of the union." *Id.*, at 66. The sympathies of the Council members who spoke lay with the union. But rather than defeat the renewal outright, the council reached a consensus for rejection of the extension with a possibility for reopening the issue if the parties settled their labor dispute before the franchise expired the following week. Four Council members endorsed this approach, and the Assistant City Attorney said that he clearly had informed the parties that this was the city's position. *Id.*, at 68. The Council President said: "I find that it will be very difficult to get this ordinance past (sic) to extend this franchise if the labor dispute is not settled by the end of this week." *Id.*, at 75. He added: "I just think that this kind of information should be put out in the open, so everybody understands it." *Ibid.* The Council, by a vote of 11 to 1, defeated the motion to extend the franchise and it expired by its terms on March 31.

II

Golden State filed this action in the United States District Court for the Central District of California, alleging that the city's action was pre-empted by the NLRA and violated the company's rights to due process and equal protection. It sought declaratory and injunctive relief and damages. The District Court found that it was "undisputed that the sole basis for refusing to extend [Golden State's] franchise was its labor dispute with its Teamster drivers," 520 F. Supp. 191, 193 (1981); that the Council had "threaten[ed] to allow Yellow Cab's franchise to terminate unless it entered into a collective bargaining agreement with the Teamsters," *id.*, at 194; and that the Council had denied the company an essential weapon of economic strength—the ability to wait out a strike. On the basis of the pre-emption claim, the District Court granted Golden State's motion for a preliminary injunction to preserve the franchise. *Ibid.* The Court of Appeals for the Ninth Circuit found "ample evidence" in the record to support the District Court's finding, but nevertheless vacated the injunction. 686 F. 2d 758, 759, 762 (1982). The court reasoned that Golden State had little chance of prevailing on its pre-emption claim or on the other grounds it asserted. This Court denied Golden State's petition for certiorari. 459 U. S. 1105 (1983).

Following litigation on unrelated issues,[1] and with the company having abandoned its equal protection claim, the District Court granted summary judgment for the city. App. to Pet. for Cert. 11a. Golden State had not moved for summary judgment in its favor. The Court of Appeals affirmed, holding that the city's action was not pre-empted. 754 F. 2d 830 (1985). The court felt that, when the activity regulated is only a peripheral or incidental concern of labor policy, traditional municipal regulation is not pre-empted. The court found nothing in the record to suggest that the city's nonrenewal decision "was not concerned with transportation." *Id.*, at 833. Moreover, to avoid undue restriction of local regulation, "only actions seeking to directly alter the substantive outcome of a labor dispute should be preempted." Here, the city had not attempted to dictate the terms of the agreement, but had "merely insisted upon resolution of the dispute as a condition to franchise renewal." *Ibid.* The Court of Appeals also rejected Golden State's due process claim. *Id.*, at 833–834.[2] Because of our concern about the propriety of the grant of summary judgment for the city in this factual and labor context, we granted certiorari. 472 U. S. 1016 (1985).[3]

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[1] Antitrust claims were asserted in a second amended complaint filed by Golden State. The District Court granted the city partial summary judgment as to these claims, 563 F. Supp. 169 (CD Cal. 1983), and the Court of Appeals affirmed. 726 F. 2d 1430 (CA9 1984). We again denied certiorari. 471 U. S. 1003 (1985).

III

A

Last Term, in *Metropolitan Life Ins. Co.* v. *Massachusetts,* 471 U. S. 724 (1985), we again noted: "The Court has articulated two distinct NLRA pre-emption principles." *Id.*, at 748. See also *Belknap, Inc.* v. *Hale,* 463 U. S. 491, 498–499 (1983). The first, the so-called *Garmon* pre-emption, see *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236 (1959), prohibits States from regulating "activity that the NLRA protects, prohibits, or arguably protects or prohibits." *Wisconsin Dept. of Industry* v. *Gould Inc.*, *ante,* at 286. The *Garmon* rule is intended to preclude state interference with the National Labor Relations Board's interpretation and active enforcement of the "integrated scheme of regulation" established by the NLRA.

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[2] One judge concurred in the majority's due process analysis but otherwise concurred only in the judgment. As to pre-emption, he would have granted summary judgment for the city on the ground that Golden State had failed to provide evidence of the city's motive or of the economic impact on Golden State. 754 F. 2d, at 834.

[3] The city contends that the case is moot because the franchise, if renewed, would have expired on March 31, 1985. But if petitioner's franchise renewal had been granted in 1981, petitioner would have faced a renewal procedure in 1985 rather than the more onerous task of obtaining a franchise through competitive bidding. See Tr. of Oral Arg. 25–26. But for the nonrenewal in 1981, Golden State would be more likely to have an operating franchise now. At oral argument, counsel for Golden State said the company was ready to resume operations, even though it was in Chapter 11 bankruptcy. *Id.*, at 5. It therefore cannot be said that "[i]ntervening events have . . . 'irrevocably eradicated the effects of the alleged violation.'" *Los Angeles* v. *Lyons*, 461 U. S. 95, 101 (1983), quoting *County of Los Angeles* v. *Davis*, 440 U. S. 625, 631 (1979). We conclude, therefore, that the case is not moot.

Ante, at 289. See *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S., at 748, and n. 26.

This case, however, concerns the second pre-emption principle, the so-called *Machinists* pre-emption.[4] See *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S. 132 (1976). This precludes state and municipal regulation "concerning conduct that Congress intended to be unregulated." *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S., at 749.[5] Although the labor-management relationship is structured by the NLRA, certain areas intentionally have been left "'to be controlled by the free play of economic forces.'" *Machinists*, 427 U. S., at 140, quoting *NLRB* v. *Nash-Finch Co.*, 404 U. S. 138, 144 (1971). The Court recognized in *Machinists* that "'Congress has been rather specific when it has come to outlaw particular economic weapons,'" 427 U. S., at 143, quoting *NLRB* v. *Insurance Agents*, 361 U. S. 477, 498 (1960), and that Congress' decision to prohibit certain forms of economic pressure while leaving others unregulated represents an intentional balance "'between the uncontrolled power of management and labor to further their respective interests.'" *Machinists*, 427 U. S., at 146, quoting *Teamsters* v. *Morton*, 377 U. S. 252, 258–259 (1964). States are therefore prohibited from imposing additional restrictions on economic weapons of self-help, such as strikes or lockouts, see 427 U. S., at 147, unless such restrictions presumably were contemplated by Congress. "Whether self-help economic activities are employed by employer or union, the crucial inquiry regarding pre-emption is the same: whether 'the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes.'" *Id.*, at 147–148, quoting *Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U. S. 369, 380 (1969).

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[4] We do not reach the question whether the city's action in this case is pre-empted under *Garmon*, because Golden State and its supporting *amici*, including the NLRB, rely exclusively on the *Machinists* doctrine, and we find their argument persuasive.

[5] Our pre-emption analysis is not affected by the fact that we are reviewing a city's actions rather than those of a State. See *Fisher* v. *Berkeley*, *ante*, at 265. And the fact that the city acted through franchise procedures rather than a court order or a general law also is irrelevant to our analysis. "[J]udicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted." *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 243 (1959). See *Wisconsin Dept. of Industry* v. *Gould Inc.*, *ante*, p. 282.

B

There is no question that the Teamsters and Golden State employed permissible economic tactics. The drivers were entitled to strike—and to time the strike to coincide with the Council's decision—in an attempt to apply pressure on Golden State. See *NLRB* v. *Insurance Agents*, 361 U. S., at 491, 496. And Golden State was entirely justified in using its economic power to withstand the strike in an attempt to obtain bargaining concessions from the union. See *Belknap, Inc.* v. *Hale*, 463 U. S., at 493, 500 (employer has power to hire replacements during an economic strike); *American Ship Building Co.* v. *NLRB*, 380 U. S. 300, 318 (1965) (at bargaining impasse employer may use lockout solely to bring economic pressure on union).

The parties' resort to economic pressure was a legitimate part of their collective-bargaining process. *Machinists*, 427 U. S., at 144. But the bargaining process was thwarted when the city in effect imposed a positive durational limit on the exercise of economic self-help. The District Court found that the Council had conditioned the franchise on a settlement of the labor dispute by March 31. We agree with the Court of Appeals that this finding is amply supported by the record.[6] The city's insistence on a settlement is pre-empted if the city "'[entered] into the substantive aspects of the bargaining process to an extent Congress has not countenanced.'" *Machinists*, 427 U. S., at 149, quoting *NLRB* v. *Insurance Agents*, 361 U. S., at 498.

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[6] The District Court's finding is supported by objective factors such as what the city—through the Council and the Assistant City Attorney—told the parties, and its schedule of Council meetings. At the meeting of March 23, 1981, four Council members without contradiction pointedly con-

That such a condition—by a city or the National Labor Relations Board—contravenes congressional intent is demonstrated by the language of the NLRA and its legislative history. The NLRA requires an employer and a union to bargain in good faith, but it does not require them to reach agreement. § 8(d), as amended, 29 U. S. C. § 158(d) (duty to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession"); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45 (1937) ("The theory of the Act is that free opportunity for negotiation . . . may bring about the adjustments and agreements which the Act in itself does not attempt to compel").

The Act leaves the bargaining process largely to the parties. See *H. K. Porter Co.* v. *NLRB*, 397 U. S. 99, 103 (1970). It does not purport to set any time limits on negotiations or economic struggle. Instead, the Act provides a framework for the negotiations; it "is concerned primarily with establishing an equitable process for determining terms and conditions of employment." *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S., at 753. See also § 1, as amended, of the NLRA, 29 U. S. C. § 151 (Act achieves

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veyed the settlement condition to the parties as the Council's "bottom line" on the issue. The condition also was announced to the parties by the Council's agent, the Assistant City Attorney, revealing that the condition was city policy. Moreover, the condition was evident from the schedule on which the Council considered the question. Golden State's franchise issue was deferred from February 11 to the 17th, from February 17 to March 23, and from March 23 to the 31st. Only Golden State, among the franchise applicants, was subjected to a conditional 1-month extension of its franchise. The only plausible reason for these repeated short extensions is that the city was giving the franchise holder additional time to comply with a particular requirement. Yet Golden State was in compliance with all the terms of the franchise except the Council's desire for a settlement.

national policy "by encouraging the practice and procedure of collective bargaining").

The legislative history, too, makes clear that the Act and the National Labor Relations Board were intended to facilitate bargaining between the parties. The Senate Report states: "Disputes about wages, hours of work, and other working conditions should continue to be resolved by the play of competitive forces . . . . This bill in no respect regulates or even provides for supervision of wages or hours, nor does it establish any form of compulsory arbitration." S. Rep. No. 573, 74th Cong., 1st Sess., 2 (1935). Senator Wagner, sponsor of the NLRA, said that the Board would not usurp the role of free collective action. See 79 Cong. Rec. 6184 (1935). See also *id.*, at 7574 (Sen. Wagner affirming that the Act encourages "voluntary settlement of industrial disputes").

Protecting the free use of economic weapons during the course of negotiations was the rationale for this Court's findings of pre-emption in *Machinists* and in its predecessor, *Teamsters* v. *Morton*, 377 U. S. 252 (1964). In some areas of labor relations that the NLRA left unregulated, we have concluded that Congress contemplated state regulation. See *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S., at 754–758; *New York Tel. Co.* v. *New York Labor Dept.*, 440 U. S. 519, 540–544 (1979) (plurality opinion); *id.*, at 547 and 549 (opinions concurring in result and concurring in judgment). Los Angeles, however, has pointed to no evidence of such congressional intent with respect to the conduct at issue in this case.[7]

Instead, the city argues that it is somehow immune from labor pre-emption solely because of the nature of its conduct.[8] The city contends it was not regulating labor, but simply exercising a traditional municipal function in issuing taxicab franchises. We recently rejected a similar argument to the effect that a State's spending decisions are not subject to pre-emption. See *Wisconsin Dept. of Industry* v. *Gould Inc., ante,* at 287–288. Cf. *Metropolitan Life Ins. Co.* v. *Massachusetts,* 471 U. S., at 754–758. Similarly, in the transportation area, a State may not ensure uninterrupted service to the public by prohibiting a strike by the unionized employees of a privately owned local transit company. See *Bus Employees* v. *Missouri,* 374 U. S. 74 (1963); cf. *Bus Employees* v. *Wisconsin Employment Relations Board,* 340 U. S. 383, 391–392 (1951). Nor in this case may a city restrict a transportation employer's ability to resist a strike. Although in each *Bus Employees* case the employees' right to strike was protected by § 7, as amended, of the NLRA, 29 U. S. C. § 157, "'[r]esort to economic weapons should more peaceful measures not avail' is the right of the employer as well as the employee," and "the State may not prohibit the use of such weapons . . . any more than in the case of employees." *Machinists* v. *Wisconsin Employment Relations Comm'n,* 427 U. S., at 147, quoting *American Ship Building Co.* v. *NLRB,* 380 U. S., at 317. "[F]ederal law intended to leave the employer and the union free to use their economic weapons against one another." *Belknap, Inc.* v. *Hale,* 463 U. S., at 500. We hold, therefore, that the city was pre-empted from conditioning Golden State's franchise renewal on the settlement of the labor dispute.

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[7] There is no issue here that, rather than regulating the relationship between the employer and the union, the city's action protected innocent third parties from the employer. See *Belknap, Inc.* v. *Hale*, 463 U. S. 491, 500 (1983) (third parties hired as strike replacements based on misrepresentations by the employer had state-law causes of action).

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[8] The Court of Appeals, in holding that the city's action was not pre-empted, reasoned that what the city did involved merely a peripheral concern of federal labor law. The idea that state action may be upheld under such circumstances is part of the *Garmon* analysis. See *Belknap, Inc.* v. *Hale,* 463 U. S., at 498–499. Because we hold that the city directly interfered with the bargaining process—a central concern of the NLRA—we need not reach the question whether this exception applies to a *Machinists* case. But see *Metropolitan Life Ins. Co.* v. *Massachusetts,* 471 U. S. 724, 754–758 (1985).

The city, however, contends that it was in a no-win situation: having not renewed the franchise and thus permitting it to lapse, it stands accused of favoring the union; had it granted the renewal, it would have been accused of favoring the employer. But the question is not whether the city's action favors one side or the other. Our holding does not require a city to renew or to refuse to renew any particular franchise. We hold only that a city cannot condition a franchise renewal in a way that intrudes into the collective-bargaining process.

C

"Free collective bargaining is the cornerstone of the structure of labor-management relations carefully designed by Congress when it enacted the NLRA." *New York Tel. Co.* v. *New York Labor Dept.*, 440 U. S., at 551 (POWELL, J., dissenting). Even though agreement is sometimes impossible, government may not step in and become a party to the negotiations. See *H. K. Porter Co.* v. *NLRB*, 397 U. S., at 103–104. A local government, as well as the National Labor Relations Board, lacks the authority to "'introduce some standard of properly "balanced" bargaining power' . . . or to define 'what economic sanctions might be permitted negotiating parties in an "ideal" or "balanced" state of collective bargaining.'" *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S., at 149–150, quoting *NLRB* v. *Insurance Agents*, 361 U. S. 477, 497–500 (1960). The settlement condition imposed by the Los Angeles City Council, as we read the summary-judgment record before us, destroyed the balance of power designed by Congress, and frustrated Congress' decision to leave open the use of economic weapons.

In this case, the District Court and the Court of Appeals found that the city had conditioned the renewal of Golden State's franchise on the company's reaching a labor agreement with the Teamsters, but held that the city's action was not pre-empted by *Machinists*. This was error as a matter of law. Whether summary judgment should have been entered for Golden State is a matter we do not decide, for petitioner made no motion for summary judgment on the issue of pre-emption.

The Court of Appeals' judgment affirming the summary judgment entered for the city is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE REHNQUIST, dissenting.

The city of Los Angeles refused to renew Golden State's taxicab franchise unless it settled a labor dispute with its drivers. The Court of Appeals for the Ninth Circuit stated that "[n]othing in the record indicates that the City's refusal to renew or extend Golden State's franchise until an agreement was reached and operations resumed was not concerned with transportation." 754 F. 2d 830, 833 (1985). Nonetheless, the Court today holds that "a city cannot condition a franchise renewal in a way that intrudes into the collective-bargaining process." *Ante*, at 619. The extraordinary breadth of the Court's holding is best illustrated by comparing it to this Court's initial cases involving federal labor preemption.

In *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U. S. 767 (1947), this Court addressed the permissible scope of state regulation of labor disputes by examining New York's so-called Little Wagner Act, under which foremen were permitted to unionize. The status of foremen under the federal Act had been a matter of dispute at the time that New York asserted its right to supervise the organization of a union of foremen at the Bethlehem Steel Company plant in that State. See *id.*, at 770. The State argued that its labor relations machinery could operate at least until similar benefits for foremen were sought by the union under the federal Act. See *id.*, at 771. This Court held that the federal law pre-empted the state law on this point; both dealt with exactly the same subject matter and whether or not they were the same or different with respect to the permissibility of organizing foremen made no difference. *Id.*, at 775. If they were the same, the procedures were duplicative. *Id.*, at 776. If they were different, they were potentially antagonistic. *Ibid.*

Six years later, in *Garner* v. *Teamsters*, 346 U. S. 485 (1953), the Court was presented with a claim of pre-emption under the Taft-Hartley Act, which imposed regulations and duties on labor correlative to the those imposed on management by the Wagner Act. The case involved unionized drivers who had engaged in conduct clearly prohibited by the Taft-Hartley Act, which might have made them subject to a cease-and-desist order by the National Labor Relations Board. See *id.*, at 486–487. But instead of resorting to the federal agency, the employer successfully sought an injunction against the prohibited picketing from a Pennsylvania state court. See *id.*, at 487. This Court held that state duplication of remedies provided by the National Labor Relations Act was pre-empted even though the state remedy was provided by a court rather than a state labor agency. See *id.*, at 487, 499–501.

The opinions in both *Bethlehem Steel* and *Garner* observed that Congress had furnished no guidance to the Court as to whether or not state regulation should be pre-empted:

> "Congress has not seen fit to lay down even the most general of guides to construction of the Act, as it sometimes does, by saying that its regulation either shall or shall not exclude state action." *Bethlehem Steel, supra,* at 771.
>
> "The national Labor Management Relations Act, as we have before pointed out, leaves much to the states, though Congress has refrained from telling us how much." *Garner, supra,* at 488 (footnote omitted).

The Court stated in both that it was forced simply to divine the will of Congress by implication:

> "[The] exclusion of state action may be implied from the nature of the legislation and the subject matter although express declaration of such result is wanting." *Bethlehem Steel*, *supra*, at 772.
>
> "We must spell out from conflicting indications of congressional will the area in which state action is still permissible." *Garner*, *supra*, at 488.

From the acorns of these two very sensible decisions has grown the mighty oak of this Court's labor pre-emption doctrine, which sweeps ever outward though still totally uninformed by any express directive from Congress. The National Labor Relations Board, organized management, and organized labor have vied with each other in urging the Court to sweep into the maw of labor relations law concerns that would have been regarded as totally peripheral to that body of law by the Congresses which enacted the Wagner Act and the Taft-Hartley Act.

Today we are told that a city, not seeking to place its weight on one side or the other of the scales of economic warfare, may not condition the renewal of a taxicab franchise on the settlement of a labor dispute. The settlement of that dispute would have enabled the company to put its taxis back on the streets where the franchise presumably contemplated they would be. The Court says that since the Labor Board may not structure an ideal balance of collective-bargaining weapons, the city may not consider the existence of a labor dispute in deciding whether to renew a franchise. See *ante*, at 619–620. We are further told that because a State may not legislate to provide uninterrupted service to the public by prohibiting a strike of public utility employees, a city may not act upon its views of sound transportation policy to refuse to renew a taxi franchise unless the franchisee settles a labor dispute and returns its cabs to the purpose for which the franchise exists. See *ante*, at 617–618. Such sweeping generalizations commend themselves neither to common sense nor to whatever hypothetical "intent of Congress" as can be discerned in an area so remote from the core concerns of labor-management relations addressed by federal labor law.

Federal pre-emption of state law is a matter of congressional intent, presumed or expressed. Because Congress cannot foresee the various ways in which state laws might rub up against the operation of federal statutes, the Court in a multitude of cases has held state regulation pre-empted even when Congress has not expressed any intent to pre-empt because of the danger that the existence of federal and state regulations side by side will interfere with the achievement of the objectives of the federal legislation. The entire body of this Court's labor law pre-emption doctrine has been built on a series of implications as to congressional intent in the face of congressional silence, so that we now have an elaborate pre-emption doctrine traceable not to any expression of Congress, but only to statements by this Court in its previous opinions of what Congress must have intended.

The Court today doffs its hat to the legislative history of the Wagner Act and comes up with the following three items:

> "[1] The Senate Report states: 'Disputes about wages, hours of work, and other working conditions should continue to be resolved by the play of competitive forces . . . . This bill in no respect regulates or even provides for supervision of wages or hours, nor does it establish any form of compulsory arbitration.'
>
> "[2] Senator Wagner, sponsor of the NLRA, said that the Board would not usurp the role of free collective action.
>
> "[3] Senator Wagner affirm[ed] that the Act encourages 'voluntary settlement of industrial disputes.'" *Ante*, at 617 (citations omitted).

These three bits of legislative history furnish absolutely no support for the result the Court reaches today. The observations that the Wagner Act leaves it to the parties to resolve their disputes by the play of competitive forces, that the Labor Board would not usurp the role of free collective action, and that the Act encourages voluntary settlement of industrial disputes, simply do not speak to the question whether a city may condition the renewal of a taxicab franchise on the settlement of a labor dispute. I do not believe that Congress intended the labor law net to be cast this far, and I therefore dissent.

MICHIGAN *v.* JACKSON

CERTIORARI TO THE SUPREME COURT OF MICHIGAN

No. 84–1531. Argued December 9, 1985—Decided April 1, 1986*

Respondents, at separate arraignments in a Michigan trial court on unrelated murder charges, each requested appointment of counsel. But before respondents had an opportunity to consult with counsel, police officers, after advising respondents of their *Miranda* rights, questioned them and obtained confessions. Both respondents were convicted over objections to the admission of the confessions in evidence. The Michigan Court of Appeals reversed and remanded in one case, but affirmed in the other. The Michigan Supreme Court considered both cases together, and held that the confessions were improperly obtained in violation of the Sixth Amendment.

Held: The confessions should have been suppressed. Although the rule of *Edwards* v. *Arizona*, 451 U. S. 477, that once a suspect has invoked his right to counsel, police may not initiate interrogation until counsel has been made available to the suspect, rested on the Fifth Amendment and concerned a request for counsel made during custodial interrogation, the reasoning of that case applies with even greater force to these cases. The assertion of the right to counsel is no less significant, and the need for additional safeguards no less clear, when that assertion is made at an arraignment and when the basis for it is the Sixth Amendment. If police initiate an interrogation after a defendant's assertion of his right to counsel at an arraignment or similar proceeding, as in these cases, any waiver of that right for that police-initiated interrogation is invalid. Pp. 629–635.

421 Mich. 39, 365 N. W. 2d 56, affirmed.

STEVENS, J., delivered the opinion of the Court in which BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. BURGER, C. J., filed an opinion concurring in the judgment, *post*, p. 636. REHNQUIST, J., filed a dissenting opinion, in which POWELL and O'CONNOR, JJ., joined, *post*, p. 637.

Brian E. Thiede argued the cause for petitioner in both cases and filed a brief for petitioner in No. 84–1539. *John D.*

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*Together with No. 84–1539, *Michigan* v. *Bladel*, also on certiorari to the same court.

O'Hair, *Timothy A. Baughman*, and *A. George Best II* filed a brief for petitioner in No. 84–1531.

James Krogsrud, by appointment of the Court, 473 U. S. 903, argued the cause for respondent in No. 84–1531. With him on the brief was *James R. Neuhard*. *Ronald J. Bretz*, by appointment of the Court, 473 U. S. 903, argued the cause and filed a brief for respondent in No. 84–1539.

JUSTICE STEVENS delivered the opinion of the Court.

In *Edwards* v. *Arizona*, 451 U. S. 477 (1981), we held that an accused person in custody who has "expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.*, at 484–485. In *Solem* v. *Stumes*, 465 U. S. 638 (1984), we reiterated that "*Edwards* established a bright-line rule to safeguard pre-existing rights," *id.*, at 646: "once a suspect has invoked the right to counsel, any subsequent conversation must be initiated by him." *Id.*, at 641.

The question presented by these two cases is whether the same rule applies to a defendant who has been formally charged with a crime and who has requested appointment of counsel at his arraignment. In both cases, the Michigan Supreme Court held that postarraignment confessions were improperly obtained—and the Sixth Amendment violated—because the defendants had "requested counsel during their arraignments, but were not afforded an opportunity to consult with counsel before the police initiated further interrogations." 421 Mich. 39, 67–68, 365 N. W. 2d 56, 69 (1984). We agree with that holding.

I

The relevant facts may be briefly stated. Respondent Bladel was convicted of the murder of three railroad employees at the Amtrak Station in Jackson, Michigan, on December 31, 1978. Bladel, a disgruntled former employee, was arrested on January 1, 1979, and, after being questioned on two occasions, was released on January 3. He was arrested again on March 22, 1979, and agreed to talk to the police that evening without counsel. On the following morning, Friday, March 23, 1979, Bladel was arraigned. He requested that counsel be appointed for him because he was indigent. The detective in charge of the Bladel investigation was present at the arraignment. A notice of appointment was promptly mailed to a law firm, but the law firm did not receive it until Tuesday, March 27. In the interim, on March 26, 1979, two police officers interviewed Bladel in the county jail and obtained a confession from him. Prior to that questioning, the officers properly advised Bladel of his *Miranda* rights.[1] Although he had inquired about his representation several times since the arraignment, Bladel was not told that a law firm had been appointed to represent him.

The trial court overruled Bladel's objection to the admissibility of all four statements. On appeal from his conviction and sentence, Bladel challenged only the postarraignment confession. The Michigan Court of Appeals first rejected that challenge and affirmed the conviction, 106 Mich. App. 397, 308 N. W. 2d 230 (1981), but, after reconsideration in the light of a recent decision by the State Supreme Court, it reversed and remanded for a new trial. 118 Mich. App. 498, 325 N. W. 2d 421 (1982). The Michigan Supreme Court then granted the prosecutor's application for leave to appeal and considered the case with respondent Jackson's appeal of his conviction. 421 Mich. 39, 365 N. W. 2d 56 (1984).

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[1] See *Miranda* v. *Arizona*, 384 U. S. 436 (1966). The *Miranda* warnings were also given prior to the questioning on January 1, January 2, and March 22. Although Bladel made certain inculpatory statements on those occasions, he denied responsibility for the murder until after the arraignment. As the Michigan Supreme Court noted, even without his own statements, the evidence against Bladel was substantial. 421 Mich., at 44, and n. 2, 365 N. W. 2d, at 58–59, and n. 2.

Respondent Jackson was convicted of second-degree murder and conspiracy to commit second-degree murder. He was one of four participants in a wife's plan to have her husband killed on July 12, 1979. Arrested on an unrelated charge on July 30, 1979, he made a series of six statements in response to police questioning prior to his arraignment at 4:30 p.m. on August 1. During the arraignment, Jackson requested that counsel be appointed for him. The police involved in his investigation were present at the arraignment. On the following morning, before he had an opportunity to consult with counsel, two police officers obtained another statement from Jackson to "confirm" that he was the person who had shot the victim. As was true of the six prearraignment statements, the questioning was preceded by advice of his *Miranda* rights and Jackson's agreement to proceed without counsel being present.

The Michigan Court of Appeals held that the seventh statement was properly received in evidence. 114 Mich. App. 649, 319 N. W. 2d 613 (1982). It distinguished *Edwards* on the ground that Jackson's request for an attorney had been made at his arraignment whereas Edwards' request had been made during a custodial interrogation by the police. Accordingly, it affirmed Jackson's conviction of murder, although it set aside the conspiracy conviction on unrelated grounds.

The Michigan Supreme Court held that the postarraignment statements in both cases should have been suppressed. Noting that the Sixth Amendment right to counsel attached at the time of the arraignments, the court concluded that the *Edwards* rule "applies by analogy to those situations where an accused requests counsel before the arraigning magistrate. Once this request occurs, the police may not conduct further interrogations until counsel has been made available to the accused, unless the accused initiates further communications, exchanges, or conversations with the police. . . . The police cannot simply ignore a defendant's unequivocal request for counsel." 421 Mich., at 66–67, 365 N. W. 2d, at 68–69 (footnote omitted). We granted certiorari, 471 U. S. 1124 (1985), and we now affirm.[2]

II

The question is not whether respondents had a right to counsel at their postarraignment, custodial interrogations. The existence of that right is clear. It has two sources. The Fifth Amendment protection against compelled self-incrimination provides the right to counsel at custodial interrogations. *Edwards,* 451 U. S., at 482; *Miranda* v. *Arizona,* 384 U. S. 436, 470 (1966). The Sixth Amendment guarantee of the assistance of counsel also provides the right to counsel at postarraignment interrogations. The arraignment signals "the initiation of adversary judicial proceedings" and thus the attachment of the Sixth Amendment, *United States* v. *Gouveia,* 467 U. S. 180, 187, 188 (1984);[3] thereafter, government efforts to elicit information from the accused, including interrogation, represent "critical stages" at which the Sixth Amendment applies. *Maine* v. *Moulton*, 474 U. S. 159 (1985); *United States* v. *Henry*, 447 U. S. 264 (1980); *Brewer* v. *Williams*, 430 U. S. 387 (1977); *Massiah* v. *United States*, 377 U. S. 201 (1964). The question in these cases is whether respondents validly waived their right to counsel at the postarraignment custodial interrogations.

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[2] Respondent Jackson points out that the Michigan Supreme Court also held that his fourth, fifth, and sixth statements should have been suppressed on grounds of prearraignment delay under a state statute. He therefore argues that the decision rests on an adequate and independent state ground and that the writ of certiorari should be dismissed. The state-court opinion, however, does not apply that prearraignment-delay holding to the seventh statement. Thus, although the Michigan court's holding on the other statements does mean that Jackson's conviction must be reversed regardless of this Court's decision, the admissibility of the seventh statement is controlled by that court's Sixth Amendment analysis, and is properly before us.

[3] In *Jackson,* the State concedes that the arraignment represented the initiation of formal legal proceedings, and that the Sixth Amendment attached at that point. Brief for Petitioner in No. 84–1531, p. 10. In *Bladel,* however, the State disputes that contention, Brief for Petitioner in No. 84–1539, pp. 24–26. In view of the clear language in our decisions about the significance of arraignment, the State's argument is untenable. See, *e. g., Brewer* v. *Williams,* 430 U. S. 387, 398 (1977) ("[A] person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him—'whether by way of formal charge, preliminary hearing, indictment, information, *or arraignment*'") (emphasis added), quoting *Kirby* v. *Illinois,* 406 U. S. 682, 689 (1972) (plurality opinion). See also *United States* v. *Gouveia,* 467 U. S., at 187–188 (quoting

In *Edwards*, the request for counsel was made to the police during custodial interrogation, and the basis for the Court's holding was the Fifth Amendment privilege against compelled self-incrimination. The Court noted the relevance of various Sixth Amendment precedents, 451 U. S., at 484, n. 8, but found it unnecessary to rely on the possible applicability of the Sixth Amendment. *Id.*, at 480, n. 7. In these cases, the request for counsel was made to a judge during arraignment, and the basis for the Michigan Supreme Court opinion was the Sixth Amendment's guarantee of the assistance of counsel.[4] The State argues that the *Edwards* rule should not apply to these circumstances because there are legal differences in the basis for the claims; because there are

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Kirby); *Estelle* v. *Smith*, 451 U. S. 454, 469–470 (1981) (quoting *Kirby*); *Moore* v. *Illinois*, 434 U. S. 220, 226 (1977) (quoting *Kirby*). Cf. *Powell* v. *Alabama*, 287 U. S. 45, 57 (1932) ("[T]he most critical period of the proceedings against these defendants" was "*from the time of their arraignment* until the beginning of their trial") (emphasis added). The question whether arraignment signals the initiation of adversary judicial proceedings, moreover, is distinct from the question whether the arraignment itself is a critical stage requiring the presence of counsel, absent a valid waiver. Cf. *Hamilton* v. *Alabama*, 368 U. S. 52 (1961) (Alabama arraignment is a "critical stage").

[4] The Michigan Supreme Court found that "defendants' request to the arraigning magistrate for appointment of counsel implicated only their Sixth Amendment right to counsel," 421 Mich., at 52, 365 N. W. 2d, at 62, because the request was not made during custodial interrogation. It was for that reason that the Michigan court did not rely on a Fifth Amendment *Edwards* analysis. We express no comment on the validity of the Michigan court's Fifth Amendment analysis.

factual differences in the contexts of the claims; and because respondents signed valid waivers of their right to counsel at the postarraignment custodial interrogations. We consider these contentions in turn.

The State contends that differences in the legal principles underlying the Fifth and Sixth Amendments compel the conclusion that the *Edwards* rule should not apply to a Sixth Amendment claim. *Edwards* flows from the Fifth Amendment's right to counsel at custodial interrogations, the State argues; its relevance to the Sixth Amendment's provision of the assistance of counsel is far less clear, and thus the *Edwards* principle for assessing waivers is unnecessary and inappropriate.

In our opinion, however, the reasons for prohibiting the interrogation of an uncounseled prisoner who has asked for the help of a lawyer are even stronger after he has been formally charged with an offense than before. The State's argument misapprehends the nature of the pretrial protections afforded by the Sixth Amendment. In *United States* v. *Gouveia*, we explained the significance of the formal accusation, and the corresponding attachment of the Sixth Amendment right to counsel:

> "[G]iven the plain language of the Amendment and its purpose of protecting the unaided layman at critical confrontations with his adversary, our conclusion that the right to counsel attaches at the initiation of adversary judicial criminal proceedings 'is far from a mere formalism.' *Kirby* v. *Illinois*, 406 U. S., at 689. It is only at that time 'that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'" 467 U. S., at 189.

As a result, the "Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a 'medium' between him and the State." *Maine* v. *Moulton*, 474 U. S., at 176. Thus, the Sixth Amendment right to counsel at a postarraignment interrogation requires at least as much protection as the Fifth Amendment right to counsel at any custodial interrogation.

Indeed, after a formal accusation has been made—and a person who had previously been just a "suspect" has become an "accused" within the meaning of the Sixth Amendment—the constitutional right to the assistance of counsel is of such importance that the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of their investigation. Thus, the surreptitious employment of a cellmate, see *United States* v. *Henry*, 447 U. S. 264 (1980), or the electronic surveillance of conversations with third parties, see *Maine* v. *Moulton, supra; Massiah* v. *United States*, 377 U. S. 201 (1964), may violate the defendant's Sixth Amendment right to counsel even though the same methods of investigation might have been permissible before arraignment or indictment.[5] Far from undermining the *Edwards* rule, the difference between the legal basis for the rule applied in *Edwards* and the Sixth Amendment claim asserted in these cases actually provides additional support for the application of the rule in these circumstances.

The State also relies on the factual differences between a request for counsel during custodial interrogation and a request for counsel at an arraignment. The State maintains that respondents may not have actually intended their request for counsel to encompass representation during any further questioning by the police. This argument, however, must be considered against the backdrop of our standard for assessing waivers of constitutional rights. Almost a half century ago, in *Johnson* v. *Zerbst,* 304 U. S. 458 (1938), a case involving an alleged waiver of a defendant's Sixth Amendment right to counsel, the Court explained that we should "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Id.*, at 464. For that reason, it is the State that has the burden of establishing a valid waiver. *Brewer* v. *Williams*, 430 U. S., at 404. Doubts must be resolved in favor of protecting the constitutional claim. This settled approach to questions of waiver requires us to give a broad, rather than a narrow, interpretation to a defendant's request for counsel—we presume that the defendant requests the lawyer's services at every critical stage of the prosecution.[6] We thus reject the State's suggestion that respondents' requests for the appointment of counsel should be construed to apply only to representation in formal legal proceedings.[7]

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[5] Similarly, after the initiation of adversary judicial proceedings, the Sixth Amendment provides a right to counsel at a "critical stage" even when there is no interrogation and no Fifth Amendment applicability. See *United States* v. *Wade*, 388 U. S. 218 (1967) (Sixth Amendment provides right to counsel at postindictment lineup even though Fifth Amendment is not implicated).

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[6] In construing respondents' request for counsel, we do not, of course, suggest that the right to counsel turns on such a request. See *Brewer* v. *Williams*, 430 U. S., at 404 ("[T]he right to counsel does not depend upon a request by the defendant"); *Carnley* v. *Cochran*, 369 U. S. 506, 513 (1962) ("[I]t is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request"). Rather, we construe the defendant's request for counsel as an extremely important fact in considering the validity of a subsequent waiver in response to police-initiated interrogation.

[7] We also agree with the comments of the Michigan Supreme Court about the nature of an accused's request for counsel:

"Although judges and lawyers may understand and appreciate the subtle distinctions between the Fifth and Sixth Amendment rights to counsel, the average person does not. When an accused requests an attorney, either before a police officer or a magistrate, he does not know which constitutional right he is invoking; he therefore should not be expected to articulate exactly why or for what purposes he is seeking counsel. It makes little sense to afford relief from further interrogation to a defendant who asks a

The State points to another factual difference: the police may not know of the defendant's request for attorney at the arraignment. That claimed distinction is similarly unavailing. In the cases at bar, in which the officers in charge of the investigations of respondents were present at the arraignments, the argument is particularly unconvincing. More generally, however, Sixth Amendment principles require that we impute the State's knowledge from one state actor to another. For the Sixth Amendment concerns the confrontation between the State and the individual.[8] One set of state actors (the police) may not claim ignorance of defendants' unequivocal request for counsel to another state actor (the court).

The State also argues that, because of these factual differences, the application of *Edwards* in a Sixth Amendment context will generate confusion. However, we have frequently emphasized that one of the characteristics of *Edwards* is its clear, "bright-line" quality. See, *e. g., Smith* v. *Illinois*, 469 U. S. 91, 98 (1984); *Solem* v. *Stumes*, 465 U. S., at 646; *Oregon* v. *Bradshaw*, 462 U. S. 1039, 1044 (1983) (plurality opinion); *id.*, at 1054, n. 2 (MARSHALL, J., dissenting). We do not agree that applying the rule when the accused requests counsel at an arraignment, rather than in the police station, somehow diminishes that clarity. To the extent that there may have been any doubts about interpreting a request

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police officer for an attorney, but permit further interrogation to a defendant who makes an identical request to a judge. The simple fact that defendant has requested an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries singlehandedly." 421 Mich., at 63–64, 365 N. W. 2d, at 67.

[8] See, *e. g., Maine* v. *Moulton*, 474 U. S. 159, 170–171 (1985):

"Once the right to counsel has attached and been asserted, *the State* must of course honor it. This means more than simply that *the State* cannot prevent the accused from obtaining the assistance of counsel. The Sixth Amendment also imposes on *the State* an affirmative obligation to respect and preserve the accused's choice to seek this assistance" (emphasis added) (footnote omitted).

for counsel at an arraignment, or about the police responsibility to know of and respond to such a request, our opinion today resolves them.

Finally, the State maintains that each of the respondents made a valid waiver of his Sixth Amendment rights by signing a postarraignment confession after again being advised of his constitutional rights. In *Edwards*, however, we rejected the notion that, after a suspect's request for counsel, advice of rights and acquiescence in police-initiated questioning could establish a valid waiver. 451 U. S., at 484. We find no warrant for a different view under a Sixth Amendment analysis. Indeed, our rejection of the comparable argument in *Edwards* was based, in part, on our review of earlier Sixth Amendment cases.[9] Just as written waivers are insufficient to justify police-initiated interrogations after the request for counsel in a Fifth Amendment analysis, so too they are insufficient to justify police-initiated interrogations after the request for counsel in a Sixth Amendment analysis.[10]

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[9] After stating our holding that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights," 451 U. S., at 484, we appended this footnote:

"In *Brewer* v. *Williams*, 430 U. S. 387 (1977), where, as in *Massiah* v. *United States*, 377 U. S. 201 (1964), the Sixth Amendment right to counsel had accrued, the Court held that a valid waiver of counsel rights should not be inferred from the mere response by the accused to overt or more subtle forms of interrogation or other efforts to elicit incriminating information. In *Massiah* and *Brewer*, counsel had been engaged or appointed and the admissions in question were elicited in his absence. But in *McLeod* v. *Ohio*, 381 U. S. 356 (1965), we summarily reversed a decision that the police could elicit information after indictment even though counsel had not yet been appointed." *Id.*, at 484, n. 8.

[10] The State also argues that the Michigan Supreme Court's finding of a valid Fifth Amendment waiver should require the finding of a valid Sixth Amendment waiver. The relationship between the validity of waivers for Fifth and Sixth Amendment purposes has been the subject of considerable attention in the courts, 421 Mich., at 55–62, 365 N. W. 2d, at 63–67 (discussing and collecting cases), and the commentaries, *id.*, at 54, n. 15, 365

III

Edwards is grounded in the understanding that "the assertion of the right to counsel [is] a significant event," 451 U. S., at 485, and that "additional safeguards are necessary when the accused asks for counsel." *Id.*, at 484. We conclude that the assertion is no less significant, and the need for additional safeguards no less clear, when the request for counsel is made at an arraignment and when the basis for the claim is the Sixth Amendment. We thus hold that, if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid.

Although the *Edwards* decision itself rested on the Fifth Amendment and concerned a request for counsel made during custodial interrogation, the Michigan Supreme Court correctly perceived that the reasoning of that case applies with even greater force to these cases. The judgments are accordingly affirmed.

It is so ordered.

CHIEF JUSTICE BURGER, concurring in the judgment.

I concurred only in the judgment in *Edwards* v. *Arizona*, 451 U. S. 477, 487–488 (1981), and in doing so I observed:

> "The extraordinary protections afforded a person in custody suspected of criminal conduct are not without a valid basis, but as with all 'good' things they can be carried too far."

The urge for "bright-line" rules readily applicable to a host of varying situations would likely relieve this Court some-

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N. W. 2d, at 63, n. 15. In view of our holding that the *Edwards* rule applies to the Sixth Amendment and that the Sixth Amendment requires the suppression of the postarraignment statements, we need not decide either the validity of the Fifth Amendment waiver in this case, see n. 4, *supra*, or the general relationship between Fifth and Sixth Amendment waivers.

what from more than a doubling of the Court's work in recent decades, but this urge seems to be leading the Court to an absolutist, mechanical treatment of the subject. At times, it seems, the judicial mind is in conflict with what behavioral—and theological—specialists have long recognized as a natural human urge of people to confess wrongdoing. See, *e. g.*, T. Reik, The Compulsion to Confess (1959).

We must, of course, protect persons in custody from coercion, but step by step we have carried this concept well beyond sound, common-sense boundaries. The Court's treatment of this subject is an example of the infirmity of trying to perform the rulemaking function on a case-by-case basis, ignoring the reality that the criminal cases coming to this Court, far from typical, are the "hard" cases. This invokes the ancient axiom that hard cases can make bad law.

Stare decisis calls for my following the rule of *Edwards* in this context, but plainly the subject calls for reexamination. Increasingly, to borrow from Justice Cardozo, more and more "criminal[s] . . . go free because the constable has blundered." *People* v. *Defore*, 242 N. Y. 13, 21, 150 N. E. 585, 587 (1926).

JUSTICE REHNQUIST, with whom JUSTICE POWELL and JUSTICE O'CONNOR join, dissenting.

The Court's decision today rests on the following deceptively simple line of reasoning: *Edwards* v. *Arizona*, 451 U. S. 477 (1981), created a bright-line rule to protect a defendant's Fifth Amendment rights; Sixth Amendment rights are even more important than Fifth Amendment rights; therefore, we must also apply the *Edwards* rule to the Sixth Amendment. The Court prefers this neat syllogism to an effort to discuss or answer the only relevant question: Does the *Edwards* rule make sense in the context of the Sixth Amendment? I think it does not, and I therefore dissent from the Court's unjustified extension of the *Edwards* rule to the Sixth Amendment.

My disagreement with the Court stems from our differing understandings of *Edwards*. In *Edwards*, this Court held that once a defendant has invoked his right under *Miranda* v. *Arizona*, 384 U. S. 436 (1966), to have counsel present during custodial interrogation, "a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." 451 U. S., at 484. This "prophylactic rule," see *Solem* v. *Stumes*, 465 U. S. 638, 644, 645 (1984), was deemed necessary to prevent the police from effectively "overriding" a defendant's assertion of his *Miranda* rights by "badgering" him into waiving those rights. See *Oregon* v. *Bradshaw*, 462 U. S. 1039, 1044 (1983) (plurality opinion of REHNQUIST, J.) (*Edwards* rule "designed to protect an accused in police custody from being badgered by police officers").[1] In short, as we explained in later cases, "*Edwards* did not confer a substantive constitutional right that had not existed before; it 'created a protective umbrella serving to enhance a constitutional guarantee.'" *Solem* v. *Stumes*, *supra*, at 644, n. 4, quoting *Michigan* v. *Payne*, 412 U. S. 47, 54 (1973); see also *Shea* v. *Louisiana*, 470 U. S. 51, 61 (1985) (WHITE, J., dissenting) (describing "prophylactic purpose" of *Edwards* rule).

What the Court today either forgets or chooses to ignore is that the "constitutional guarantee" referred to in *Solem* v. *Stumes* is the Fifth Amendment's prohibition on compelled self-incrimination. This prohibition, of course, is also the constitutional underpinning for the set of prophylactic rules announced in *Miranda* itself. See *Moran* v. *Burbine*, *ante*, at 424–425; *Oregon* v. *Elstad*, 470 U. S. 298, 304–305, 306, and n. 1 (1985).[2] *Edwards,* like *Miranda,* imposes on the police a bright-line standard of conduct intended to help ensure that confessions obtained through custodial interrogation will not be "coerced" or "involuntary." Seen in this proper light, *Edwards* provides nothing more than a second layer of protection, in addition to those rights conferred by *Miranda,* for a defendant who might otherwise be compelled by the police to incriminate himself in violation of the Fifth Amendment.

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[1] The four dissenters in *Oregon* v. *Bradshaw* apparently agreed with the plurality's characterization of the *Edwards* rule. See 462 U. S., at 1055, n. 2 (MARSHALL, J., joined by BRENNAN, BLACKMUN, and STEVENS, JJ., dissenting) (citing passage from plurality opinion quoted in the text, and noting that "[t]he only dispute between the plurality and the dissent in this case concerns the meaning of 'initiation' for purposes of *Edwards' per se* rule").

The dispositive question in the instant cases, and the question the Court should address in its opinion, is whether the same kind of prophylactic rule is needed to protect a defendant's right to counsel under the Sixth Amendment. The answer to this question, it seems to me, is clearly "no." The Court does not even suggest that the police commonly deny defendants their Sixth Amendment right to counsel. Nor, I suspect, would such a claim likely be borne out by empirical evidence. Thus, the justification for the prophylactic rules this Court created in *Miranda* and *Edwards,* namely, the perceived widespread problem that the police were violating, and would probably continue to violate, the Fifth Amendment rights of defendants during the course of custodial interrogations, see *Miranda, supra,* at 445–458,[3] is conspicu-

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[2] The Court suggests, in dictum, that the Fifth Amendment also provides defendants with a "right to counsel." See *ante,* at 629. But our cases make clear that the Fifth Amendment itself provides no such "right." See *Moran* v. *Burbine, ante,* at 423, n. 1; *Oregon* v. *Elstad,* 470 U. S., at 304–305. Instead, *Miranda* confers upon a defendant a "right to counsel," *but only when such counsel is requested during custodial interrogations.* Even under *Miranda,* the "right to counsel" exists solely as a means of protecting the defendant's Fifth Amendment right not to be compelled to incriminate himself.

[3] In *Miranda,* this Court reviewed numerous instances in which police brutality had been used to coerce a defendant into confessing his guilt. The Court then stated:

"The use of physical brutality and violence is not, unfortunately, relegated to the past or to any part of the country. . . .

"The examples given above are undoubtedly the exception now, but they are sufficiently widespread to be the object of concern. Unless a proper ously absent in the Sixth Amendment context. To put it simply, the prophylactic rule set forth in *Edwards* makes no sense at all except when linked to the Fifth Amendment's prohibition against compelled self-incrimination.

Not only does the Court today cut the *Edwards* rule loose from its analytical moorings, it does so in a manner that graphically reveals the illogic of the Court's position. The Court phrases the question presented in these cases as whether the *Edwards* rule applies "to a defendant who has been formally charged with a crime *and who has requested appointment of counsel at his arraignment.*" *Ante*, at 626 (emphasis added). And the Court ultimately limits its holding to those situations where the police "initiate interrogation *after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel.*" *Ante*, at 636 (emphasis added).

In other words, the Court most assuredly does *not* hold that the *Edwards per se* rule prohibiting all police-initiated interrogations applies from the moment the defendant's Sixth Amendment right to counsel attaches, with or without a request for counsel by the defendant. Such a holding would represent, after all, a shockingly dramatic restructuring of the balance this Court has traditionally struck between the rights of the defendant and those of the larger society. Applying the *Edwards* rule to situations in which a defendant has not made an explicit request for counsel would also render completely nugatory the extensive discussion of "waiver" in such prior Sixth Amendment cases as *Brewer* v. *Williams*, 430 U. S. 387, 401–406 (1977). See also *id.*, at 410 (POWELL, J., concurring) ("The critical factual issue is whether there had been a voluntary waiver"); *id.*, at 417 (BURGER, C. J., dissenting) ("[I]t is very clear that Williams had made a valid

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limitation upon custodial interrogation is achieved . . . there can be no assurance that practices of this nature will be eradicated in the foreseeable future." 384 U. S., at 446–447.

waiver of his . . . Sixth Amendment right to counsel); *id.*, at 430, n. 1 (WHITE, J., joined by BLACKMUN and REHNQUIST, JJ., dissenting) ("It does not matter whether the right not to make statements in the absence of counsel stems from *Massiah* v. *United States*, 377 U. S. 201 (1964), or *Miranda* v. *Arizona*, 384 U. S. 436 (1966). In either case the question is one of waiver").[4]

This leaves the Court, however, in an analytical straitjacket. The problem with the limitation the Court places on the Sixth Amendment version of the *Edwards* rule is that, unlike a defendant's "right to counsel" under *Miranda*, which does not arise until affirmatively invoked by the defendant during custodial interrogation, a defendant's Sixth Amendment right to counsel does not depend at all on whether the defendant has requested counsel. See *Brewer* v. *Williams*, *supra*, at 404; *Carnley* v. *Cochran*, 369 U. S. 506, 513 (1962). The Court acknowledges as much in footnote six of its opinion, where it stresses that "we do not, of course, suggest that the right to counsel turns on . . . a request [for counsel]." *Ante*, at 633, n. 6.

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[4] See also *Moran* v. *Burbine*, *ante*, at 428 ("It is clear, of course, that, *absent a valid waiver*, the defendant has the right to the presence of an attorney during any interrogation occurring after the first formal charging proceeding, the point at which the Sixth Amendment right to counsel initially attaches").

Several of our Sixth Amendment cases have indeed erected virtually *per se* barriers against certain kinds of police conduct. See, *e. g.*, *Maine* v. *Moulton*, 474 U. S. 159 (1985); *United States* v. *Henry*, 447 U. S. 264 (1980); *Massiah* v. *United States*, 377 U. S. 201 (1964). These cases, however, all share one fundamental characteristic that separates them from the instant cases; in each case, the nature of the police conduct was such that it would have been impossible to find a valid waiver of the defendant's Sixth Amendment right to counsel. See *Maine* v. *Moulton*, *supra*, at 176–177 (undisclosed electronic surveillance of conversations with a third party); *United States* v. *Henry*, *supra*, at 265, 273 (use of undisclosed police informant); *Massiah* v. *United States*, *supra*, at 202 (undisclosed electronic surveillance). Here, on the other hand, the conduct of the police was totally open and aboveboard, and could not be said to prevent the defendant from executing a valid Sixth Amendment waiver under the standards set forth in *Johnson* v. *Zerbst*, 304 U. S. 458 (1938).

The Court provides no satisfactory explanation for its decision to extend the *Edwards* rule to the Sixth Amendment, yet limit that rule to those defendants foresighted enough, or just plain lucky enough, to have made an explicit request for counsel which we have always understood to be completely unnecessary for Sixth Amendment purposes. The Court attempts to justify its emphasis on the otherwise legally insignificant request for counsel by stating that "we construe the defendant's request for counsel as an extremely important fact in considering the validity of a subsequent waiver in response to police-initiated interrogation." *Ibid.* This statement sounds reasonable, but it is flatly inconsistent with the remainder of the Court's opinion, in which the Court holds that there can be no waiver of the Sixth Amendment right to counsel after a request for counsel has been made. See *ante*, at 635–636, n. 10. It is obvious that, for the Court, the defendant's request for counsel is not merely an "extremely important fact"; rather, it is the *only* fact that counts.

The truth is that there is no satisfactory explanation for the position the Court adopts in these cases. The glaring inconsistencies in the Court's opinion arise precisely because the Court lacks a coherent, analytically sound basis for its decision. The prophylactic rule of *Edwards*, designed from its inception to protect a defendant's right under the Fifth Amendment not to be compelled to incriminate himself, simply does not meaningfully apply to the Sixth Amendment. I would hold that *Edwards* has no application outside the context of the Fifth Amendment, and would therefore reverse the judgment of the court below.

AT&T TECHNOLOGIES, INC. *v.* COMMUNICATIONS WORKERS OF AMERICA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 84-1913. Argued January 22, 1986—Decided April 7, 1986

Petitioner employer and respondent Union are parties to a collective-bargaining agreement covering telephone equipment installation workers. Article 8 of the agreement provides for arbitration of differences arising over interpretation of the agreement. Article 9 provides that subject to certain limitations, but otherwise not subject to the arbitration clause, petitioner is free to exercise certain management functions, including the hiring, placement, and termination of employees. Article 20 prescribes the order in which employees will be laid off "[w]hen lack of work necessitates Layoff." The Union filed a grievance challenging petitioner's decision to lay off 79 installers from its Chicago location, claiming that there was no lack of work at that location and that therefore the layoffs would violate Article 20. But petitioner laid off the installers and refused to submit the grievance to arbitration on the ground that under Article 9 the layoffs were not arbitrable. The Union then sought to compel arbitration by filing suit in Federal District Court, which, after finding that the Union's interpretation of Article 20 was at least "arguable," held that it was for the arbitrator, not the court, to decide whether that interpretation had merit, and, accordingly, ordered petitioner to arbitrate. The Court of Appeals affirmed.

Held: The issue whether, because of express exclusion or other evidence, the dispute over interpretation of Article 20 was subject to the arbitration clause, should have been decided by the District Court and reviewed by the Court of Appeals, and should not have been referred to the arbitrator. Pp. 648–657.

(a) Under the principles set forth in the *Steelworkers Trilogy* (*Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564; *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574; and *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593), it was the District Court's duty to interpret the collective-bargaining agreement and to determine whether the parties intended to arbitrate grievances concerning layoffs predicated on a "lack of work" determination by petitioner. If the court should determine that the agreement so provides, then it would be for the arbitrator to determine the relative merits of the parties' substantive interpretations of the agreement. Pp. 648–651.

(b) This Court will not examine the collective-bargaining agreement for itself and affirm the Court of Appeals on the ground that the parties had agreed to arbitrate the dispute over the layoffs. It is not this Court's function in the first instance to construe collective-bargaining agreements and arbitration clauses, or to consider any other evidence that might demonstrate that a particular grievance was not subject to arbitration. Pp. 651–652.

751 F. 2d 203, vacated and remanded.

WHITE, J., delivered the opinion for a unanimous Court. BRENNAN, J., filed a concurring opinion, in which BURGER, C. J., and MARSHALL, J., joined, *post*, p. 652.

Rex E. Lee argued the cause for petitioner. With him on the briefs were *David W. Carpenter*, *Gerald D. Skoning*, *Charles C. Jackson*, *Howard J. Trienens*, *Alfred A. Green*, and *Joseph Ramirez*.

Laurence Gold argued the cause for respondents. With him on the brief were *Irving M. Friedman*, *Stanley Eisenstein*, *Harold A. Katz*, *David Silberman*, and *James Coppess*.*

JUSTICE WHITE delivered the opinion of the Court.

The issue presented in this case is whether a court asked to order arbitration of a grievance filed under a collective-bargaining agreement must first determine that the parties intended to arbitrate the dispute, or whether that determination is properly left to the arbitrator.

I

AT&T Technologies, Inc. (AT&T or the Company), and the Communications Workers of America (the Union) are parties to a collective-bargaining agreement which covers telephone equipment installation workers. Article 8 of this agreement

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*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States by *John S. Irving*, *Carl L. Taylor*, and *Stephen A. Bokat;* and for the National Association of Manufacturers by *Jan S. Admundson* and *Gary D. Lipkin*.

David E. Feller filed a brief for the National Academy of Arbitrators as *amicus curiae* urging affirmance.

establishes that "differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder" must be referred to a mutually agreeable arbitrator upon the written demand of either party. This Article expressly does not cover disputes "excluded from arbitration by other provisions of this contract."[1] Article 9 provides that, "subject to the limitations contained in the provisions of this contract, but otherwise not subject to the provisions of the arbitration clause," AT&T is free to exercise certain management functions, including the hiring and placement of employees and the termination of employment.[2] "When lack of work necessitates Layoff," Article 20 prescribes the order in which employees are to be laid off.[3]

On September 17, 1981, the Union filed a grievance challenging AT&T's decision to lay off 79 installers from its Chicago base location. The Union claimed that, because there was no lack of work at the Chicago location, the planned layoffs would violate Article 20 of the agreement. Eight days later, however, AT&T laid off all 79 workers, and soon thereafter, the Company transferred approximately the same number of installers from base locations in Indiana and Wisconsin to the Chicago base. AT&T refused to submit the grievance to arbitration on the ground that under Article 9 the Company's decision to lay off workers when it determines that a lack of work exists in a facility is not arbitrable.

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[1] Article 8 provides, in pertinent part, as follows:

"If the National and the Company fail to settle by negotiation any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder, such differences shall (provided that such dispute is not excluded from arbitration by other provisions of this contract, and provided that the grievance procedures as to such dispute have been exhausted) be referred upon written demand of either party to an impartial arbitrator mutually agreeable to both parties." App. 21.

[2] Article 9 states:

"The Union recognizes the right of the Company (subject to the limitations contained in the provisions of this contract, but otherwise not subject to the provisions of the arbitration clause) to exercise the functions of managing the business which involve, among other things, the hiring and placement of Employees, the termination of employment, the assignment of work, the determination of methods and equipment to be used, and the control of the conduct of work." *Id.*, at 22.

[3] Article 20 provides, in pertinent part, that "[w]hen lack of work necessitates Layoff, Employees shall be Laid-Off in accordance with Term of Employment and by Layoff groups as set forth in the following [subparagraphs stating the order of layoff]." *Id.*, at 23. Article 1.11 defines the term "Layoff" to mean "a termination of employment arising out of a reduction in the force due to lack of work." *Id.*, at 20.

The Union then sought to compel arbitration by filing suit in federal court pursuant to § 301(a) of the Labor Management Relations Act, 29 U. S. C. § 185(a).[4] *Communications Workers of America* v. *Western Electric Co.*, No. 82 C 772 (ND Ill., Nov. 18, 1983). Ruling on cross-motions for summary judgment, the District Court reviewed the provisions of Articles 8, 9, and 20, and set forth the parties' arguments as follows:

> "Plaintiffs interpret Article 20 to require that there be an actual lack of work prior to employee layoffs and argue that there was no such lack of work in this case. Under plaintiffs' interpretation, Article 20 would allow the union to take to arbitration the threshold issue of whether the layoffs were justified by a lack of work. Defendant interprets Article 20 as merely providing a sequence for any layoffs which management, in its exclusive judgment, determines are necessary. Under defendant's interpretation, Article 20 would not allow for an arbitrator to decide whether the layoffs were warranted by a lack of work but only whether the company

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[4] Section 301(a), 61 Stat. 156, 29 U. S. C. § 185(a) states:

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect of the amount in controversy or without regard to the citizenship of the parties."

> followed the proper order in laying off the employees." App. to Pet. for Cert. 10A.

Finding that "the union's interpretation of Article 20 was at least 'arguable,'" the court held that it was "for the arbitrator, not the court to decide whether the union's interpretation has merit," and accordingly, ordered the Company to arbitrate. *Id.*, at 11A.

The Court of Appeals for the Seventh Circuit affirmed. *Communications Workers of America* v. *Western Electric Co.*, 751 F. 2d 203 (1984). The Court of Appeals understood the District Court to have ordered arbitration of the threshold issue of arbitrability. *Id.*, at 205, n. 4. The court acknowledged the "general rule" that the issue of arbitrability is for the courts to decide unless the parties stipulate otherwise, but noted that this Court's decisions in *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960), and *Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564 (1960), caution courts to avoid becoming entangled in the merits of a labor dispute under the guise of deciding arbitrability. From this observation, the court announced an "exception" to the general rule, under which "a court should compel arbitration of the arbitrability issue where the collective bargaining agreement contains a standard arbitration clause, the parties have not clearly excluded the arbitrability issue from arbitration, and deciding the issue would entangle the court in interpretation of substantive provisions of the collective bargaining agreement and thereby involve consideration of the merits of the dispute." 751 F. 2d, at 206.

All of these factors were present in this case. Article 8 was a "standard arbitration clause," and there was "no clear, unambiguous exclusion from arbitration of terminations predicated by a lack of work determination." *Id.*, at 206–207. Moreover, although there were "colorable arguments" on both sides of the exclusion issue, if the court were to decide this question it would have to interpret not only Article 8, but Articles 9 and 20 as well, both of which are "substantive provisions of the Agreement." The court thus "decline[d] the invitation to decide arbitrability," and ordered AT&T "to arbitrate the arbitrability issue." *Id.*, at 207.

The court admitted that its exception was "difficult to reconcile with the Supreme Court's discussion of a court's duty to decide arbitrability in [*John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543 (1964)]." The court asserted, however, that the discussion was "dicta," and that this Court had reopened the issue in *Nolde Brothers, Inc.* v. *Bakery Workers*, 430 U. S. 243, 255, n. 8 (1977). 751 F. 2d, at 206.

We granted certiorari, 474 U. S. 814 (1985), and now vacate the Seventh Circuit's decision and remand for a determination of whether the Company is required to arbitrate the Union's grievance.

II

The principles necessary to decide this case are not new. They were set out by this Court over 25 years ago in a series of cases known as the *Steelworkers Trilogy: Steelworkers* v. *American Mfg. Co., supra; Steelworkers* v. *Warrior & Gulf Navigation Co., supra;* and *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960). These precepts have served the industrial relations community well, and have led to continued reliance on arbitration, rather than strikes or lockouts, as the preferred method of resolving disputes arising during the term of a collective-bargaining agreement. We see no reason either to question their continuing validity, or to eviscerate their meaning by creating an exception to their general applicability.

The first principle gleaned from the *Trilogy* is that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Warrior & Gulf, supra*, at 582; *American Mfg. Co., supra*, at 570–571 (BRENNAN, J., concurring). This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration. *Gateway Coal Co.* v. *Mine Workers*, 414 U. S. 368, 374 (1974).

The second rule, which follows inexorably from the first, is that the question of arbitrability—whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance—is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator. *Warrior & Gulf*, *supra*, at 582–583. See *Operating Engineers* v. *Flair Builders, Inc.*, 406 U. S. 487, 491 (1972); *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238, 241 (1962), overruled in part on other grounds, *Boys Markets, Inc.* v. *Retail Clerks*, 398 U. S. 235 (1970). Accord, *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 626 (1985).

The Court expressly reaffirmed this principle in *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543 (1964). The "threshold question" there was whether the court or an arbitrator should decide if arbitration provisions in a collective-bargaining contract survived a corporate merger so as to bind the surviving corporation. *Id.*, at 546. The Court answered that there was "no doubt" that this question was for the courts. "'Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties.' . . . The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty." *Id.*, at 546–547 (citations omitted).

The third principle derived from our prior cases is that, in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims. Whether "arguable" or not, indeed even if it appears to the court to be frivolous, the union's claim that the employer has violated the collective-bargaining agreement is to be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator. "The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious." *American Mfg. Co.*, 363 U. S., at 568 (footnote omitted).

Finally, it has been established that where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Warrior & Gulf*, 363 U. S., at 582–583. See also *Gateway Coal Co.* v. *Mine Workers*, *supra*, at 377–378. Such a presumption is particularly applicable where the clause is as broad as the one employed in this case, which provides for arbitration of "any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder . . . ." In such cases, "[i]n the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *Warrior & Gulf*, *supra*, at 584–585.

This presumption of arbitrability for labor disputes recognizes the greater institutional competence of arbitrators in interpreting collective-bargaining agreements, "furthers the national labor policy of peaceful resolution of labor disputes and thus best accords with the parties' presumed objectives in pursuing collective bargaining." *Schneider Moving & Storage Co.* v. *Robbins*, 466 U. S. 364, 371–372 (1984) (citation omitted). See *Gateway Coal Co.*, *supra*, at 378–379. The willingness of parties to enter into agreements that provide for arbitration of specified disputes would be "drastically reduced," however, if a labor arbitrator had the "power to determine his own jurisdiction . . . ." Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1509 (1959). Were this the applicable rule, an arbitrator would not be constrained to resolve only those disputes that the parties have agreed in advance to settle by arbitration, but, instead, would be empowered "to impose obligations outside the contract limited only by his understanding and conscience." *Ibid.* This result undercuts the longstanding federal policy of promoting industrial harmony through the use of collective-bargaining agreements, and is antithetical to the function of a collective-bargaining agreement as setting out the rights and duties of the parties.

With these principles in mind, it is evident that the Seventh Circuit erred in ordering the parties to arbitrate the arbitrability question. It is the court's duty to interpret the agreement and to determine whether the parties intended to arbitrate grievances concerning layoffs predicated on a "lack of work" determination by the Company. If the court determines that the agreement so provides, then it is for the arbitrator to determine the relative merits of the parties' substantive interpretations of the agreement. It was for the court, not the arbitrator, to decide in the first instance whether the dispute was to be resolved through arbitration.

The Union does not contest the application of these principles to the present case. Instead, it urges the Court to examine the specific provisions of the agreement for itself and to affirm the Court of Appeals on the ground that the parties had agreed to arbitrate the dispute over the layoffs at issue here. But it is usually not our function in the first instance to construe collective-bargaining contracts and arbitration clauses, or to consider any other evidence that might unmistakably demonstrate that a particular grievance was not to be subject to arbitration. The issue in the case is whether, because of express exclusion or other forceful evidence, the dispute over the interpretation of Article 20 of the contract, the layoff provision, is not subject to the arbitration clause. That issue should have been decided by the District Court and reviewed by the Court of Appeals; it should not have been referred to the arbitrator.

The judgment of the Court of Appeals is vacated, and the case is remanded for proceedings in conformity with this opinion.

It is so ordered.

JUSTICE BRENNAN, with whom THE CHIEF JUSTICE and JUSTICE MARSHALL join, concurring.

I join the Court's opinion and write separately only to supplement what has been said in order to avoid any misunderstanding on remand and in future cases.

The Seventh Circuit's erroneous conclusion that the arbitrator should decide whether this dispute is arbitrable resulted from that court's confusion respecting the "arbitrability" determination that we have held must be judicially made. Despite recognizing that Article 8 of the collective-bargaining agreement "is a standard arbitration clause, providing for arbitration of 'any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder,'" and that "there is no clear, unambiguous exclusion [of this dispute] from arbitration," the Court of Appeals thought that "there [were] colorable arguments both for and against exclusion." *Communications Workers of America* v. *Western Electric Co.*, 751 F. 2d 203, 206–207 (1984). The "colorable arguments" referred to by the Court of Appeals were the parties' claims concerning the meaning of Articles 9 and 20 of the collective-bargaining agreement: the Court of Appeals thought that if the Union's interpretation of Article 20 was correct and management could not order layoffs for reasons other than lack of work, the dispute was arbitrable; but if AT&T's interpretation of Article 20 was correct and management was free to order layoffs for other reasons, the dispute was not arbitrable under Article 9. *Id.*, at 207. Because these were the very issues that would be presented to the arbitrator if the dispute was held to be arbitrable, the court reasoned that "determining arbitrability would enmesh a court in the merits of th[e] dispute," *ibid.*, and concluded that the arbitrability issue should be submitted to the arbitrator.

The Court of Appeals was mistaken insofar as it thought that determining arbitrability required resolution of the parties' dispute with respect to the meaning of Articles 9 and 20 of the collective-bargaining agreement. This is clear from our opinion in *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960). In *Warrior & Gulf*, the Union challenged management's contracting out of labor that had previously been performed by Company employees. The parties failed to resolve the dispute through grievance procedures, and the Union requested arbitration; the Company refused, and the Union sued to compel arbitration under § 301 of the Labor Management Relations Act, 29 U. S. C. § 185. The collective-bargaining agreement contained a standard arbitration clause similar to Article 8 of the AT&T/CWA contract, *i. e.*, providing for arbitration of all differences with respect to the meaning or application of the contract. We held that, in light of the congressional policy making arbitration the favored method of dispute resolution, such a provision requires arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Warrior & Gulf*, *supra*, at 582–583 (footnote omitted).

The Company in *Warrior & Gulf* relied for its argument that the dispute was not arbitrable on a "Management Functions" clause which, like Article 9 of the AT&T/CWA agreement, excluded "matters which are strictly a function of management," 363 U. S., at 576, from the arbitration provision. We recognized that such a clause "might be thought to refer to any practice of management in which, under particular circumstances prescribed by the agreement, it is permitted to indulge." *Id.*, at 584. However, we also recognized that to read the clause this way would make arbitrability in every case depend upon whether management could take the action challenged by the Union; the arbitrability of every dispute would turn upon a resolution of the merits, and "the arbitration clause would be swallowed up by the exception." *Ibid.* Therefore, we held that, where a collective-bargaining agreement contains a standard arbitration clause and the "exception" found in the Management Functions clause is general, "judicial inquiry . . . should be limited to the search for an explicit provision which brings the grievance under the cover of the [Management Functions] clause . . . ." *Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, 572 (1960) (BRENNAN, J., concurring); *Warrior & Gulf*, *supra*, at 584. "In the absence of any express provision excluding a particular grievance from arbitration, . . . only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail . . . ." 363 U. S., at 584–585.

The Seventh Circuit misunderstood these rules of contract construction and did precisely what we disapproved of in *Warrior & Gulf*—it read Article 9, a general Management Functions clause, to make arbitrability depend upon the merits of the parties' dispute. As *Warrior & Gulf* makes clear, the judicial inquiry required to determine arbitrability is much simpler. The parties' dispute concerns whether Article 20 of the collective-bargaining agreement limits management's authority to order layoffs for reasons other than lack of work. The question for the court is "strictly confined," *id.*, at 582, to whether the parties agreed to submit disputes over the meaning of Article 20 to arbitration. Because the collective-bargaining agreement contains a standard arbitration clause, the answer must be affirmative unless the contract contains explicit language stating that disputes respecting Article 20 are not subject to arbitration, or unless the party opposing arbitration—here AT&T—adduces "the most forceful evidence" to this effect from the bargaining history. Under *Warrior & Gulf*, determining arbitrability does not require the court even to consider which party is correct with respect to the meaning of Article 20.

The Court remands this case so that the court below may apply the proper standard to determine arbitrability. The Court states that "it is usually not our function in the first instance to construe collective-bargaining contracts and arbitration clauses, or to consider any other evidence that might unmistakably demonstrate that a particular grievance was not to be subject to arbitration." *Ante*, at 651–652. Of course, we have on numerous occasions construed collective-bargaining agreements "in the first instance"; we did so, for example, in the three cases comprising the *Steelworkers Trilogy*. See also *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543, 552–555 (1964); *Packinghouse Workers* v. *Needham Packing Co.*, 376 U. S. 247, 249–253 (1964). Nonetheless, I agree with the Court that we should interpret a collective-bargaining agreement only where there is some special reason to do so. Thus, it is appropriate for this Court to construe a collective-bargaining agreement where—as in the *Steelworkers Trilogy*—our decision announces a new principle of law, since applying this principle may help to clarify our meaning. There is no such need, however, where—as here—we simply reaffirm established principles. Moreover, since the determination left for the Court of Appeals on remand is straightforward and will require little time or effort, concerns for efficient judicial administration do not require us to interpret the agreement. Finally, because the parties have submitted to us only fragmentary pieces of the bargaining history, we are not in a position properly to evaluate whether there is "the most forceful evidence" that the parties did not intend for this dispute to be arbitrable. Therefore, I join the Court's opinion and concur in the Court's judgment remanding to the Court of Appeals.

UNITED STATES *v.* CITY OF FULTON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 84–1725. Argued January 21, 1986—Decided April 7, 1986

Section 5 of the Flood Control Act of 1944 (Act) authorizes the Secretary of Energy (Secretary), acting through Administrators of regional Power Marketing Administrations, to fix rates for the sale of hydroelectric power generated at federally owned dams, and provides that "the rate schedules [shall] become effective upon confirmation and approval by the Secretary." Pursuant to the Secretary's regulatory scheme, new schedules increasing rates were developed by the Southwestern Power Administration after public participation, were approved and placed into effect on an interim basis, effective April 1, 1979, and were ultimately approved on a final basis by the Federal Energy Regulatory Commission (the Secretary's delegate) in January 1982. Respondent cities, who had entered into power purchase contracts with the Government, paid the new increased rates and then filed suit in the Court of Claims to recover money paid pursuant to the interim rate increase between April 1979 and January 1982, contending that the Secretary violated § 5 of the Act and the terms of the power purchase contracts by putting the new rates into effect on an interim basis. The contracts in question provided that rates could be increased or modified and that such rates would become effective "on the effective date specified in the order of the Federal Power Commission [a predecessor of the Secretary with respect to § 5] containing such confirmation and approval." The Court of Claims ruled for respondents on the question of liability (the subsequently organized Claims Court later entered judgment in their favor), and the Court of Appeals for the Federal Circuit affirmed.

Held: Neither the Act nor the power purchase contracts at issue preclude the Secretary from making hydroelectric power rates effective upon interim confirmation and approval, even though further administrative review is still pending. Pp. 665–672.

(a) Although the above-quoted language of § 5 of the Act does not definitively speak to the question of interim rates, the relevant federal agencies' practice (at least since the mid-1970's) of allowing rates to become effective after interim confirmation and approval is as consistent with the statutory language as is respondents' preferred arrangement. While the legislative history of the Act does not resolve the ambiguity, the Secretary's interim ratesetting practice is a reasonable accommodation of the Act's conflicting policies of protecting consumers by ensuring that power be sold at the lowest possible rates consistent with sound business principles and of protecting the public fisc by ensuring that federal hydroelectric programs recover their own costs and do not require subsidies from the federal treasury. The Secretary's plan is not inconsistent with the congressional scheme, as respondents contend, on the ground that the plan's refund process if interim rates are ultimately found to be too high offers insufficient protection because refunds may not successfully trickle down to the same ultimate consumers who immediately bore the excessive charges. *FPC* v. *Tennessee Gas Transmission Co.*, 371 U. S. 145, distinguished. Pp. 666–671.

(b) Nor do interim rate increases violate the terms of respondents' power purchase contracts. The contracts contain no language unambiguously barring the imposition of interim rates. Moreover, respondents presented no evidence demonstrating that the parties intended the contractual language, which tracks that of the statute, to do anything other than incorporate the statute's procedural requirements. Pp. 671–672.

751 F. 2d 1255, reversed.

MARSHALL, J., delivered the opinion for a unanimous Court.

Andrew J. Pincus argued the cause for the United States. With him on the briefs were *Solicitor General Fried, Acting Assistant Attorney General Willard, Deputy Solicitor General Geller, David M. Cohen,* and *John W. Showalter.*

Charles F. Wheatley, Jr., argued the cause and filed a brief for respondents.*

JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the question whether the Secretary of Energy violated §5 of the Flood Control Act of 1944, 16 U. S. C. §825s, or his contractual obligations by putting rates for hydroelectric power generated at federally owned dams into effect on an interim basis pending further review by the Federal Energy Regulatory Commission. The Court of Claims held that the Secretary's actions exceeded his contractual and statutory authority, and granted summary

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**Ralph J. Gillis* and *Robert D. Willis* filed a brief for Sam Rayburn Dam Electric Cooperative, Inc., as *amicus curiae* urging affirmance.

judgment to respondents. 230 Ct. Cl. 635, 680 F. 2d 115 (1982). After further proceedings, the Court of Appeals for the Federal Circuit affirmed, finding that the Court of Claims' decision was the law of the case and correct on the merits. 751 F. 2d 1255 (1985). We granted certiorari, 473 U. S. 903 (1985), and we now reverse.

I

A

In the Flood Control Act, Congress authorized the construction of a number of dam and reservoir projects, operated by the Army Corps of Engineers and producing large blocks of hydroelectric power. Congress had granted authority for several such projects before 1944, but had enacted no "general law governing the sale and distribution of power" so generated. S. Rep. No. 1030, 78th Cong., 2d Sess., 3 (1944). Intending "to place by law the responsibility for disposal of such power in an existing Federal agency," *ibid.*, Congress provided:

> "Electric power and energy generated at reservoir projects under the control of the War Department and in the opinion of the Secretary of War not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, *the rate schedules to become effective upon confirmation and approval by the Federal Power Commission.* Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years. . . ." Ch. 665, § 5, 58 Stat. 887, 890

(emphasis added) (codified as amended at 16 U. S. C. § 825s).

In order to sell the hydroelectric power turned over to him under that statute, the Secretary of the Interior created what eventually became five regional Power Marketing Administrations (PMAs). The PMA Administrators were assigned the responsibility of preparing rate schedules and the supporting accounting and cost allocation studies. There were no formal procedures for public participation in PMA preparation of rate schedules, although some of the PMAs (not including the Southwestern Power Administration (SWPA), immediately concerned in this suit) began to adopt such procedures starting in late 1977. See 45 Fed. Reg. 86976 (1980).

When determining whether to approve a PMA's proposed rates, the Federal Power Commission utilized its "special expertise" and its "independent judgment" in measuring the proposal against the statutory standards. *Bonneville Power Administration*, 34 F. P. C. 1462, 1465 (1965).[1] Because the Flood Control Act imposed no particular procedures for Commission review of rate proposals, the Commission was largely free to design its own. See *Southeastern Power Administration*, 54 F. P. C. 1631, 1632, n. (1975). It developed a practice of affording notice and comment to customers and other affected parties when the Secretary submitted a rate schedule, and granting requests for oral argument or public hearing on a case-by-case basis.

The parties differ as to the degree to which Commission practice included the use of interim rates. The Solicitor General cites several instances in which the Commission did implement such rates; respondents answer that those instances were both isolated and unrepresentative. Our own examination of the historical record reveals that beginning in the 1970's, the Commission announced its intention to examine PMA rate proposals "on the basis of evidentiary records which are developed during the course of [adjudicatory] public hearings," *Bonneville Power Administration,* 54 F. P. C. 808, 810 (1975). It provided for full administrative hearings with cross-examination of witnesses.[2] At the same time, the Commission adopted, in some cases, the practice of examining rates submitted to it by the Secretary and, if the rates appeared to lie within the statutory boundaries, approving them on an interim basis pending the formal hearing. It required that the PMA refund any overcharges with interest if the Commission found after a hearing that an approved interim rate had been too high. See *Southeastern Power Administration,* 54 F. P. C. 3 (1975); *Bonneville Power Administration,* 52 F. P. C. 1912 (1974); see also *Bonneville Power Administration,* 58 F. P. C. 2498 (1977) (Federal Columbia River Transmission System Act). The Department of the Interior initially took the view that full evidentiary hearings were inappropriate under the Flood Control Act, and that if such hearings were to be held the Commission had no power to approve rates on an interim basis. The Commission, however, explicitly rejected that position. *Southeastern Power Administration, supra,* at 1632–1633; see also *Bonneville Power Administration,* 59 F. P. C. 1194, 1195 (1977) (Federal Columbia River Transmission System Act). The Interior Department then acquiesced in the Commission's view. See *ibid.*

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[1] The cited proceeding arose under both the Flood Control Act and the Bonneville Project Act of 1937, 50 Stat. 731, codified as amended at 16 U. S. C. §§ 832–832*l*. The relevant provisions of the two statutes are essentially identical, however, and the Commission and Secretary have treated them interchangeably. See 34 F. P. C., at 1465–1470; *infra*, at 667.

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[2] See *Southeastern Power Administration,* 54 F. P. C. 3 (1975), citing 18 CFR § 1.20 (1975) (superseded in 1978); *Bonneville Power Administration,* 52 F. P. C. 1912, 1912–1913 (1974). But see *Southwestern Power Administration,* 56 F. P. C. 795 (1976) (confirming new rate schedule without adjudicatory hearing, where SWPA had held on-the-record proceedings before proposing new rate).

B

This regulatory scheme was upset in 1977, with the passage of the Department of Energy Organization Act, 42 U. S. C. § 7101 *et seq.* (DOE Act). That statute, designed to "assur[e] coordinated and effective administration of Federal energy policy and programs," § 7112, eliminated the Secretary of the Interior's role in hydroelectric power rate regulation, and abolished the Federal Power Commission entirely. The Interior Secretary's rate-proposing function was transferred to the new Secretary of Energy, "acting by and through [the] Administrators" of the PMAs. § 7152(a)(2). The Federal Power Commission's rate approval function was transferred to the Secretary of Energy as well.[3]

The Secretary of Energy institutionalized an interim rate-approval process for hydroelectric rates. He delegated to the Assistant Secretary for Resource Applications "the authority to develop, acting by and through the [PMA] administrators, and to confirm, approve, and place in effect on an *interim* basis, power and transmission rates for the five power marketing administrations." 43 Fed. Reg. 60636 (1978) (emphasis added).[4] He simultaneously delegated to the new Federal Energy Regulatory Commission (FERC)

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[3] 42 U. S. C. § 7151(b) (transferring to the Secretary of Energy all FPC functions not explicitly transferred in Subchapter IV of the Act to the new Federal Energy Regulatory Commission). The Court of Claims' suggestion that FERC, rather than the Secretary, inherited the FPC's rate approval function has been abandoned by respondents, see *infra*, at 665, and is unsupported by the statutory language. See *United States* v. *Tex-La Electric Cooperative, Inc.*, 693 F. 2d 392, 395 (CA5 1982).

[4] The Assistant Secretary of Resource Applications' interim rate approval and implementation responsibilities were later transferred to the Assistant Secretary for Conservation and Renewable Energy. See 47 Fed. Reg. 4562, and n. 1 (1982). We shall refer to both of those officers as the "Assistant Secretary" throughout this opinion.

After FERC's final approval of the rates at issue in this case, the Secretary further modified the delegation order in certain respects. 48 Fed. Reg. 55664 (1983). The propriety of the administrative plan as modified in 1983, however, is not now before us.

"the authority to confirm and approve on a final basis, or to disapprove, rates developed by the Assistant Secretary." *Ibid.* Under the new regulatory scheme, the PMAs give extensive public notice of proposed rates. 10 CFR § 903.13 (1985). They provide all interested persons the opportunity to consult with and obtain information from the PMAs, to examine backup data, and to comment on the proposed rates. § 903.14. In most cases, the PMAs hold one or more "public information forums" and "public comment forums" regarding the rate proposal. §§ 903.15, 903.16. Following this consultation and comment period, the PMA Administrator must develop rates which, in the Assistant Secretary's judgment, should be confirmed, approved, and placed into effect on an interim basis. The Assistant Secretary must prepare a statement explaining the principal factors on which his decision to confirm and approve the rates was based. § 903.21.

The Assistant Secretary, after his interim confirmation and approval, submits the proposed rates to FERC for final confirmation and approval. FERC views its role in this process as "in the nature of an appellate body," 45 Fed. Reg. 79545, 79547 (1980); its function is to determine from the record before it whether "due process requirements have been met and [whether] the Administrator's program of rate schedules and the decision of the [Assistant Secretary] are rational and consistent with the statutory standards." *Ibid.* In exercising that appellate function, FERC relies on the record before it, remanding for supplementation if necessary. If it disapproves the interim rates confirmed and approved by the Assistant Secretary, the Assistant Secretary has the responsibility to submit acceptable substitute rates. Overcharges attributable to excessive interim rates must be refunded with interest to affected customers. 10 CFR § 903.22 (1985).

II

The dispute in this case involves the price charged for the sale of hydroelectric power by the Southwestern Power Administration (SWPA) to respondent cities of Lamar, Fulton, and Thayer, Missouri. Respondents and the United States first signed power purchase contracts in 1952, 1956, and 1963 respectively; the Lamar and Fulton contracts were renewed in early 1977. The language of the 1977 contract is typical:

> "It is understood and agreed that the rates and/or terms and conditions set forth in the said Rate Schedule 'F-1,' with the confirmation and approval of the Federal Power Commission, may be increased, decreased, modified, superseded, or supplemented, at any time, and from time to time, and that if so increased, decreased, modified, superseded, or supplemented, the new rates and/or terms and conditions shall thereupon become effective and applicable to the purchase and sale of Firm Power and Firm Energy under this Contract in accordance with and on the effective date specified in the order of the Federal Power Commission containing such confirmation and approval." 230 Ct. Cl., at 638, 680 F. 2d, at 117 (emphasis by Court of Claims deleted).

Provisions for rate increases under the contracts at issue in this case went unused for a long time. SWPA did not increase its basic rate between 1957 and 1977. 44 Fed. Reg. 13068, 13069 (1979). Unfortunately, SWPA's costs did not also remain constant. As a result, FERC found by 1979 that SWPA's annual revenues fell about $20 million short of covering costs and repaying investment. *Ibid.*

After considerable congressional and Commission prodding, see H. R. Rep. No. 95-1247, p. 59 (1978); S. Rep. No. 95-1067, p. 53 (1978); *Southwestern Power Administration*, 58 F. P. C. 2170 (1977); see also Energy and Water Development Appropriations for 1980: Hearings before the Subcommittee on Energy and Water Development of the House Committee on Appropriations, 96th Cong., 1st Sess., 2995-2998 (1979), SWPA in April 1978 finally issued notice of a proposed 42% rate increase. 43 Fed. Reg. 16545 (1978). After the close of the public participation period, SWPA developed new studies scaling down its estimate of necessary revenues, and developed new proposed rate schedules increasing basic rates only 33%. On March 1, 1979, the Assistant Secretary confirmed and approved the rates and placed them into effect on an interim basis, effective April 1, 1979. 44 Fed. Reg., at 13073.

In June 1981, FERC disapproved the rates as insufficiently supported, finding them likely to be too *low*. 46 Fed. Reg. 30877 (1981). On reconsideration in January 1982, however, FERC concluded that the rates, while "on the low side," were nonetheless reasonable; it confirmed and approved the rates through September 30, 1982. 47 Fed. Reg. 4562, 4563 (1982).

Respondents paid the increased rates assessed by SWPA. They then filed suit, seeking to recover money paid pursuant to the interim rate increase between April 1979 and January 1982. The Court of Claims ruled for respondents on the question of liability, 230 Ct. Cl. 635, 680 F. 2d 115 (1982), the Claims Court entered a $954,816 judgment in their favor, App. to Pet. for Cert. 19a–21a, and the Court of Appeals for the Federal Circuit affirmed, 751 F. 2d 1255 (1985).

III

Respondents contend that interim approval of rate increases by the Assistant Secretary violates the Flood Control Act and their power purchase contracts. They predicate their argument on the statutory direction that rate increases shall "become effective upon confirmation and approval by the Federal Power Commission," and on the similar contractual language quoted *supra*, at 659. That language, according to respondents, by its terms precludes interim rate increases.

It is important to note what questions are *not* before this Court. Respondents do not contest that the DOE Act transferred the FPC's rate-approval function to the Secretary of Energy. See Brief for Respondents 39. They agree that the Secretary could properly confirm and approve the rates on a final basis, without any further procedures or FERC involvement, *id.*, at 43–45, and that he could "delegate and divide that function amongst subordinate officials and agencies," *id.*, at 44. Further, respondents concede that the contractual language must be read, to some extent, in the light of the DOE Act: they do not argue that the contractual language, providing for rate increases "with the confirmation and approval of the Federal Power Commission," precludes any rate increase now that that body no longer exists. Rather, respondents' sole claim is that the statute and the contracts preclude the Secretary from making hydroelectric power rates effective before rendering a *final* determination that those rates satisfy all statutory requirements. A rate increase, they argue, can become effective only after the entire administrative review process has been completed.

A

We turn first to respondents' statutory contention. Section 5 of the Flood Control Act, on its face, says little about the appropriate method of rate implementation under that Act. The relevant federal agencies, however, at least since the mid-1970's, have interpreted the statute to allow interim rate increases. See *supra*, at 661–663. We must uphold that interpretation if the statute yields up no definitive contrary legislative command and if the agencies' approach is a reasonable one. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–845 (1984).

The statutory language, providing only that "the rate schedules [shall] become effective upon confirmation and approval by the [Secretary]," does not definitively speak to the question of interim rates. Respondents argue that the requirement that rate schedules become effective "upon" confirmation and approval precludes the Secretary from making rates effective before all confirmation and approval are completed. The Court of Claims agreed. We can find, however, no such unambiguous meaning in the wording of the statute. The agency's practice of allowing rates to become effective after *interim* "confirmation and approval," even though the rates are subject to further examination, is as consistent with the bare statutory language as is respondents' preferred arrangement.

Nor does the legislative history of the Flood Control Act resolve the ambiguity. Respondents draw on that legislative history in arguing that the drafters of § 5 of the Flood Control Act (like the drafters of § 6 of the Bonneville Project Act of 1937, on which § 5 of the Flood Control Act was based) intended to "protec[t] the power consumers." 90 Cong. Rec. 9283 (1944) (statement of Rep. Rankin). Respondents point out that during the pendency of an interim rate increase, power consumers pay more than they would have paid otherwise, and perhaps more than they should pay. Yet as we shall discuss more extensively below, the goal of protecting power customers is not the only policy embodied in the Flood Control Act. The existence of that policy, without more, hardly supplies an unambiguous legislative command barring any imposition of interim rates. Respondents rely on a statement by Secretary Ickes that the Federal Power Commission would have final yes-or-no authority over rates under the Bonneville Project Act, Columbia River (Bonneville Dam), Oregon and Washington: Hearings on H. R. 7642 before the House Committee on Rivers and Harbors, 75th Cong., 1st Sess., 150 (1937), but that statement is not particularly helpful in determining Congress' intent regarding interim rates.

In the absence of a clear legislative command, we must consider whether the Secretary's choice "'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute.'" *Chevron, supra,* at 845, quoting *United States* v. *Shimer,* 367 U. S. 374, 383 (1961). The Secretary has a dual obligation under the Flood Control Act. He is required to protect consumers by ensuring that power is sold "at the lowest possible rates . . . consistent with sound business principles." See *United States* v. *Tex-La Electric Cooperative, Inc.*, 693 F. 2d 392, 399–400 (CA5 1982). He is also, however, required by the plain language of the statute to protect the public fisc by ensuring that federal hydroelectric programs recover their own costs and do not require subsidies from the federal treasury. See H. R. Conf. Rep. No. 2051, 78th Cong., 2d Sess., 7 (1944); see also S. Rep. No. 2280, 74th Cong., 2d Sess., 2 (1936) (Bonneville Project Act); H. R. Rep. No. 2955, 74th Cong., 2d Sess., 2 (1936) (same).

Interim ratesetting appears well suited to accommodating that dual goal. That process protects consumers by subjecting proposed rates to initial review before they are made effective, and by allowing for refunds if the rates are ultimately disapproved. It protects the Government by allowing it to collect rate increases that are necessary for recovery of its costs, without having to wait for time-consuming final review. It helps eliminate the possibility that delay in implementation of rate increases, particularly in a period of high inflation, will cause the Government constantly to be playing catchup in its attempt to secure an appropriate rate.

Respondents argue that the Secretary's plan is inconsistent with the congressional scheme because it allows the implementation of rates that may not meet the statutory standards, and that may ultimately be found to be too high. Congress, respondents argue, intended to eliminate just such a possibility when it interposed the requirement of FPC "confirmation and approval" in the ratesetting process. The refund process, they contend, offers insufficient protection because while excessive charges are immediately passed on to the ultimate consumers, refunds of those charges may not successfully trickle down to those same consumers. Yet ratesetting agencies charged with protecting the public commonly have the power to allow rates to go into effect prior to the completion of administrative review. See, *e. g.*, Natural Gas Act, § 4(e), 15 U. S. C. § 717c(e); Federal Power Act, § 205(e), 16 U. S. C. § 824d(e); Federal Communications Act, § 204, 47 U. S. C. § 204; Interstate Commerce Act, § 15(7), 49 U. S. C. § 10708. See generally W. Jones, Cases and Materials on Regulated Industries 122–126 (2d ed. 1976). Congress plainly has not found that practice necessarily incompatible with the goal of consumer protection.

Respondents rely on *FPC* v. *Tennessee Gas Transmission Co.*, 371 U. S. 145 (1962), for the proposition that refunds are an inadequate remedy for excessive rates. In *Tennessee Gas*, the Commission was faced with a statutory scheme under which a private utility could put a rate increase into effect, after an initial suspension period, without any governmental review of the legality of the increase. The utility argued that once an increased rate went into effect, it should be allowed to collect that rate until the completion of all Commission proceedings on the legality of the rate, since any illegal charges ultimately would be subject to refund. We rejected that position, holding that the Commission did not have to rely solely on its refund procedure to protect consumers and could instead order an interim reduction of the increased rate.

Tennessee Gas does not support respondents' argument. Where the Government seeks to implement an increase under the Flood Control Act, there is no danger of unreviewed illegal rates, as in *Tennessee Gas*. The rate when implemented has already been the subject of extensive public participation and review by the Assistant Secretary. The Secretary does not rely solely on the refund procedure to protect consumers, and thus the concerns that led the *Tennessee Gas* Court to find that process inadequate are not present. Instead, *Tennessee Gas* illustrates the authority this Court repeatedly has given regulatory agencies to do precisely what respondents claim they should not be able to do—

to issue interim rate orders prior to final determinations whether proposed rates meet statutory requirements.

Respondents argue that the Secretary should be barred from setting interim rates absent explicit congressional authorization. The Secretary, they contend, cannot create a complex regulatory structure out of thin air. The provisions of the Flood Control Act, however, are general, and are in all respects less complex than the analogous provisions of the Federal Power Act governing regulation of private utility charges. Congress, in declining to set out a detailed mandatory procedural scheme, apparently intended to leave the agency substantial discretion as to how to structure its review. There is no support in the legislative history for the proposition that Congress intended to bar the Secretary from taking all steps regarding power rate regulation not explicitly set out in the general terms of § 5 of the Flood Control Act, and Congress may reasonably have intended to allow more administrative discretion with regard to this federal proprietary activity than with regard to control of private rates. Limiting the agency as respondents suggest would thus disserve Congress' goal of establishing "a convenient and practical method of disposing of power at [federal hydroelectric] projects." S. Rep. No. 1030, 78th Cong., 2d Sess., 3 (1944).

Indeed, this Court has in other contexts allowed agencies to set interim rates even though their governing statutes did not explicitly so provide. In the *Trans Alaska Pipeline Rate Cases*, 436 U. S. 631 (1978), we held that it was "an intelligent and practical exercise of [the agency's rate] suspension power," *id.*, at 653, for the Interstate Commerce Commission to set out, without a hearing, interim rates that it would allow to go into effect. We further held that the Commission had authority to condition such an action on the carriers' promise to refund charges ultimately found to be too high. That refund scheme, although nowhere explicitly approved in the statute, was a "'legitimate, reasonable, and direct adjunct to the Commission's explicit statutory power to suspend rates pending investigation.'" *Id.*, at 655, quoting *United States* v. *Chesapeake & Ohio R. Co.*, 426 U. S. 500, 514 (1976). The *Trans Alaska Pipeline Rate Cases* were decided under a quite different statutory scheme from the one at issue today, and analogies between the two statutory schemes are loose at best. We see no reason, however, why we should take a narrower approach to the Secretary's powers under the Flood Control Act than we took to the ICC's under its enabling statute.[5]

We therefore hold that the procedures established by the Secretary to exercise his powers under the Flood Control Act both are within his delegated authority and constitute a reasonable accommodation of the policies underlying that Act. At bottom, respondents seek to strike down the Secretary's scheme on the ground that it gives power customers *too much* process. They concede that there could be no objection to a scheme under which rate review was simply cut off after the Assistant Secretary's examination, but contend that the administrative plan must be invalidated because the Secretary has allowed still another layer of review. We would not be disposed to accept such a claim absent particularly compelling argument in its favor. Respondents have not supplied such argument here.

B

Respondents also argue that interim rate increases violate the terms of their power purchase contracts. Respondents make no claim that the contracts must be read literally, to bar any rate increase absent approval by a nonexistent Federal Power Commission. They nonetheless argue that the contractual language unambiguously bars the imposition of interim rates. We can detect no such absolute bar.

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[5] Respondents finally point to § 501(a)(1) of the DOE Act, 42 U. S. C. § 7191(a)(1), which provides that that Act was not intended to abrogate "administrative procedure requirements" imposed by other statutes, including the Flood Control Act. Because we find in the Flood Control Act no "administrative procedure requirement" barring interim rates, this provision adds nothing to respondents' case.

Respondents have presented no evidence demonstrating that the parties intended the contractual language, which tracks that of the statute, to do anything other than incorporate the statute's procedural requirements. The Court of Claims based its acceptance of respondents' position on its desire to construe the contracts "in harmony with" its interpretation of the statutory language, which, it noted, "is incorporated into the contract terms"; on its conclusion that there was no significant administrative practice of interim rate increases; and on its conclusion that the plain meaning of the contractual language unambiguously bars such rate increases. 230 Ct. Cl., at 641–645, 680 F. 2d, at 119–121. The first premise is no longer helpful to respondents, since we have determined that the statute allows the imposition of interim rate increases. We have also rejected the second premise, see *supra*, at 661–663. We now reject the third. The contractual provision that rate increases will become effective "on the effective date specified in the order of the Federal Power Commission containing such confirmation and approval" is, by its terms, no more of a bar to rate increases becoming effective upon *interim* "confirmation and approval" than is the parallel statutory language. If the Government had meant by that contractual language to bind itself with restrictions going beyond those contained in the statute, we believe that such restrictions would have been set out more explicitly.

IV

We conclude that nothing in the Flood Control Act or the power purchase contracts at issue in this case precludes the Secretary from making hydroelectric power rates effective upon interim confirmation and approval, even though further review is still pending. The judgment of the Court of Appeals for the Federal Circuit, accordingly, is reversed.

It is so ordered.

DELAWARE *v.* VAN ARSDALL

CERTIORARI TO THE SUPREME COURT OF DELAWARE

No. 84-1279. Argued January 22, 1986—Decided April 7, 1986

During respondent's murder trial, the Delaware trial court refused to allow defense counsel to cross-examine a prosecution witness about an agreement that he had made to speak with the prosecutor about the murder in question in exchange for the dismissal of an unrelated criminal charge against him. Respondent was convicted. The Delaware Supreme Court reversed on the ground that the trial court, by improperly restricting defense counsel's cross-examination designed to show bias on the prosecution witness' part, violated respondent's rights under the Confrontation Clause of the Sixth Amendment, and refused to consider whether such ruling was harmless beyond a reasonable doubt.

Held: While the trial court's denial of respondent's opportunity to impeach the prosecution witness for bias violated respondent's rights under the Confrontation Clause, such ruling is subject to harmless-error analysis under *Chapman* v. *California,* 386 U. S. 18. The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a number of factors, including the importance of the witness' testimony, whether the testimony was cumulative, the presence or absence of corroborating or contradictory testimony on material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case. Pp. 681-684.

486 A. 2d 1, vacated and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, *post,* p. 684. MARSHALL, J., *post,* p. 686, and STEVENS, J., *post,* p. 689, filed dissenting opinions.

Richard E. Fairbanks, Jr., argued the cause for petitioner. With him on the briefs were *Charles M. Oberly III,* Attorney General of Delaware, and *Gary A. Myers* and *Loren C. Meyers,* Deputy Attorneys General.

Paul J. Larkin, Jr., argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Acting Solicitor General Fried, Assistant Attorney General Trott, Deputy Solicitor General Frey,* and *Vincent L. Gambale.*

John Williams argued the cause for respondent. With him on the brief was *William N. Nicholas.*

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Robert Van Arsdall was convicted of murder in a Delaware trial court. The Supreme Court of Delaware reversed his conviction on the ground that the trial court, by improperly restricting defense counsel's cross-examination designed to show bias on the part of a prosecution witness, had violated respondent's confrontation rights under the Sixth and Fourteenth Amendments to the United States Constitution, and that such violation required automatic reversal. 486 A. 2d 1 (1984). While we agree that the trial court's ruling was contrary to the mandate of the Confrontation Clause of the Sixth Amendment, we conclude that the Supreme Court of Delaware was wrong when it declined to consider whether that ruling was harmless in the context of the trial as a whole.

Shortly after midnight on January 1, 1982, Doris Epps was stabbed to death in an apartment in Smyrna, Delaware, after an all-day New Year's Eve party. Respondent and Daniel Pregent, who by respondent's testimony were the only two people in the apartment with Epps at the time she was killed, were arrested at the scene of the crime and charged with Epps' murder. At separate trials, respondent was convicted and Pregent was acquitted.

The State's case against respondent was based on circumstantial evidence, and proceeded on the theory that respondent had either killed Epps or assisted Pregent in doing so. Several of the partygoers testified about the party and the scene after the killing. The party, which lasted from late in the morning of December 31, 1981, until shortly before midnight, was held in the adjacent apartments of Pregent and

Robert Fleetwood. Respondent, who was one of at least a dozen guests who attended the party during the course of the day, had stopped in for two brief periods in the late afternoon and early evening and then returned for a third time at about 11:30 p.m. By that time the party was over. Pregent had quarreled with a female guest, kicked a hole in a hallway wall and had to be restrained. An intoxicated Epps had been placed on a sofa bed in Pregent's apartment after passing out. And shortly before 11 p.m., a second altercation of some kind occurred, prompting Fleetwood to close the party in his apartment to everyone except his two friends, Alice Meinier and Mark Mood. When respondent returned to Pregent's apartment at about 11:30, only Pregent and Epps were present.

Robert Fleetwood was the 10th of 16 prosecution witnesses. In addition to recounting uncontroverted facts about the party, he testified that sometime between 11 and 11:30 p.m. he walked across the hall, looked into Pregent's living room from the doorway, and saw respondent sitting on the edge of the sofa bed next to Pregent's feet. Fleetwood, who did not have a complete view of the bed, did not see Epps or anyone else in the apartment. Upon returning to his own apartment, Fleetwood stayed awake long enough to hear nearby bells ring in the New Year, at which point he passed out. App. 82–85.

Meinier, who with Mood had remained awake in Fleetwood's apartment, testified that at roughly 1 a.m. respondent knocked at Fleetwood's door. Respondent's shirt and hands were spattered with blood, and he was holding a long, blood-covered knife. According to Meinier, respondent stated that "he had gotten in a fight" but that he "got them back." *Id.*, at 130. After turning the knife over to Mood and washing his hands, respondent said "I think there's something wrong across the hall." *Id.*, at 132. Meinier went to Pregent's apartment and discovered Epps' body lying in a pool of blood on the kitchen floor. Mood then summoned the police, who found respondent in Fleetwood's apartment and Pregent asleep on the blood-splattered sofa bed in his living room.

In addition to the testimony of the partygoers and the arresting officers, the State introduced Pregent's postarrest statement, respondent's two postarrest statements, and the testimony of a forensic expert. Among other things, the expert testified about the nature and source of the bloodstains on respondent's clothing.

During Fleetwood's cross-examination, defense counsel sought to impeach Fleetwood by questioning him about the dismissal of a criminal charge against him—being drunk on a highway—after he had agreed to speak with the prosecutor about Epps' murder. When the prosecutor objected, the trial court allowed counsel to question Fleetwood on the matter outside the presence of the jury. Fleetwood acknowledged that the drunkenness charge had been dropped in exchange for his promise to speak with the prosecutor about the murder, but he denied that the agreement had affected his testimony.[1] The trial court barred any cross-examination about that agreement, citing Delaware Rule of Evidence 403.[2] The court also refused to permit defense counsel to cross-examine Fleetwood about his being questioned by the police in connection with an unrelated homicide that had occurred after Epps' murder. On *voir dire* conducted outside the presence of the jury, Fleetwood denied that he had been offered any favors, inducements, promises, or deals concerning that homicide investigation in exchange for his testimony at respondent's trial.

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[1] When asked about his understanding of why the charge was dropped, respondent stated:

"Well, I did understand that I did feel that you wanted to make sure that I knew what I was talking about and I do feel that you wanted to make sure I had my story together before coming in here. So that is why I did feel that it was dropped." App. 106.

[2] Delaware Rule of Evidence 403, which is virtually identical to Federal Rule of Evidence 403, provides:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence."

Respondent was the only defense witness. Consistent with his second statement to the police, he attributed Epps' murder to Pregent. Consistent with Fleetwood's testimony, he stated that he had returned to Pregent's apartment, after drinking with friends, by about 11:30 p.m.

Defense counsel admitted in their opening and closing arguments to the jury that respondent was in Pregent's apartment when Epps was killed. In closing argument, after attempting to discredit Fleetwood's testimony (largely by emphasizing his intoxication), counsel stressed that all that testimony proved was what respondent "never denied," that "he was at Danny Pregent's apartment before Doris Epps was murdered." App. 188–189. The jury found respondent guilty of first-degree murder and possession of a deadly weapon during the commission of a felony.

On appeal, the Delaware Supreme Court reversed respondent's conviction on the authority of the Confrontation Clause. Noting that "the bias of a witness is subject to exploration at trial and is 'always relevant as discrediting the witness and affecting the weight of his testimony,'" 486 A. 2d, at 6 (quoting *Davis* v. *Alaska*, 415 U. S. 308, 316 (1974)), the court found that the trial judge's ruling denied respondent his constitutional right to effective cross-examination. By barring *any* cross-examination of Fleetwood about the dismissal of the public drunkenness charge, the ruling kept from the jury facts concerning bias that were central to assessing Fleetwood's reliability. The court rejected the State's argument that since "Fleetwood's basic testimony was cumulative in nature and unimportant," the Confrontation Clause error was harmless beyond a reasonable doubt. 486 A. 2d, at 7. The court held that "a blanket prohibition against exploring potential bias through cross-examination" is "a per se error," so that "the actual prejudicial impact of such an error is not examined." *Ibid.*[3]

We granted certiorari, 473 U. S. 923 (1985), and now vacate and remand.

The Confrontation Clause of the Sixth Amendment guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." The right of confrontation, which is secured for defendants in state as well as federal criminal proceedings, *Pointer* v. *Texas*, 380 U. S. 400 (1965), "means more than being allowed to confront the witness physically." *Davis* v. *Alaska*, 415 U. S., at 315. Indeed, "'[t]he main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination.*'" *Id.*, at 315–316 (quoting 5 J. Wigmore, Evidence § 1395, p. 123 (3d ed. 1940)) (emphasis in original). Of particular relevance here, "[w]e have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Davis, supra,* at 316–317 (citing *Greene* v. *McElroy,* 360 U. S. 474, 496 (1959)). It does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. And as we observed earlier this Term, "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware* v. *Fensterer,* 474 U. S. 15, 20 (1985) *(per curiam)* (emphasis in original).

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[3] Respondent asserts that this Court is without jurisdiction to hear this case because the Delaware Supreme Court's automatic reversal rule rests on an adequate and independent state ground. He argues that the rule was adopted not on the basis of federal constitutional law but as a prophylactic device, announced under that court's "superintending" authority, to "send an unequivocal message" to state trial judges about the importance of permitting liberal cross-examination. Brief for Respondent 41. We disagree.

"[W]e will not assume that a state-court decision rests on adequate and independent state grounds when the 'state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion.'" *Caldwell* v. *Mississippi*, 472 U. S. 320, 327 (1985) (quoting *Michigan* v. *Long*, 463 U. S. 1032, 1040–1041 (1983)). The opinion of the Delaware Supreme Court, which makes use of both federal and state cases in its analysis, lacks the requisite "plain statement" that it rests on state grounds. *Michigan* v. *Long*, *supra*, at 1042, 1044. Indeed, the opinion makes no reference to any "superintending" authority, and nowhere suggests the existence of a state prophylactic rule designed to insure protection for a federal constitutional right. We read the decision below as resting on federal law.

In this case, however, the trial court prohibited *all* inquiry into the possibility that Fleetwood would be biased as a result of the State's dismissal of his pending public drunkenness charge. By thus cutting off all questioning about an event that the State conceded had taken place and that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony, the court's ruling violated respondent's rights secured by the Confrontation Clause.[4]

The State somewhat tentatively suggests that a defendant should have to show "outcome determinative" prejudice in order to state a violation of the Confrontation Clause: Unless the particular limitation on cross-examination created a reasonable possibility that the jury returned an inaccurate guilty verdict, that limitation would not violate the Confrontation Clause. We disagree. While some constitutional claims by their nature require a showing of prejudice with respect to the trial as a whole, see, *e. g.*, *Strickland* v. *Washington*, 466 U. S. 668 (1984) (ineffective assistance of counsel), the focus of the Confrontation Clause is on individual witnesses. Accordingly, the focus of the prejudice inquiry in determining whether the confrontation right has been violated must be on the particular witness, not on the outcome of the entire trial. It would be a contradiction in terms to conclude that a defendant denied any opportunity to cross-examine the witnesses against him nonetheless had been afforded his right to "confront[ation]" because use of that right would not have affected the jury's verdict. We think that a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." *Davis* v. *Alaska*, *supra*, at 318. Respondent has met that burden here: A reasonable jury might have received a significantly different impression of Fleetwood's credibility had respondent's counsel been permitted to pursue his proposed line of cross-examination.

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[4] The Delaware Supreme Court did not decide whether the trial court erred in preventing respondent from cross-examining Fleetwood about the unrelated homicide investigation. 486 A. 2d 1, 7, n. 3 (1984). We likewise decline to consider that question.

After concluding that the trial judge's ruling was constitutional error, the Delaware Supreme Court rebuffed the State's effort to show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained," *Chapman* v. *California*, 386 U. S. 18, 24 (1967). In so doing, it offered no explanation why the *Chapman* harmless-error standard, which we have applied in other Confrontation Clause cases, *e. g.*, *Harrington* v. *California*, 395 U. S. 250 (1969); *Schneble* v. *Florida*, 405 U. S. 427 (1972), is inapplicable here. We find respondent's efforts to defend the automatic reversal rule unconvincing.

As we have stressed on more than one occasion, the Constitution entitles a criminal defendant to a fair trial, not a perfect one. *E. g., United States* v. *Hasting,* 461 U. S. 499, 508–509 (1983); *Bruton* v. *United States,* 391 U. S. 123, 135 (1968). In *Chapman,* this Court rejected the argument that all federal constitutional errors, regardless of their nature or the circumstances of the case, require reversal of a judgment of conviction. The Court reasoned that in the context of a particular case, certain constitutional errors, no less than other errors, may have been "harmless" in terms of their effect on the factfinding process at trial. Since *Chapman,* we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt. *E. g., United States* v. *Hasting, supra* (improper comment on defendant's silence at trial); *Moore* v. *Illinois,* 434 U. S. 220, 232 (1977) (admission of identification obtained in violation of right to counsel); *Harrington* v. *California, supra* (admission of nontestifying codefendant's statement). The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, *United States* v. *Nobles,* 422 U. S. 225, 230 (1975), and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error. Cf. R. Traynor, The Riddle of Harmless Error 50 (1970) ("Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it").

At the same time, we have observed that some constitutional errors—such as denying a defendant the assistance of counsel at trial, or compelling him to stand trial before a trier of fact with a financial stake in the outcome—are so fundamental and pervasive that they require reversal without regard to the facts or circumstances of the particular case.

Chapman, supra, at 23, n. 8 (citing, *inter alia, Gideon* v. *Wainwright,* 372 U. S. 335 (1963), and *Tumey* v. *Ohio,* 273 U. S. 510 (1927)). The error at issue here is obviously quite different, however, as this Court's post-*Chapman* decisions demonstrate. In *Harrington* v. *California,* for example, we expressly rejected the claim that the admission into evidence of a statement made by a nontestifying codefendant, in violation of *Bruton* v. *United States, supra,* can never be harmless.[5] *Harrington,* which we have expressly reaffirmed on more than one occasion, see, *e. g., Schneble* v. *Florida, supra; Brown* v. *United States,* 411 U. S. 223 (1973), demonstrates that the denial of the opportunity to cross-examine an adverse witness does not fit within the limited category of constitutional errors that are deemed prejudicial in every case.

Respondent seeks to blunt the force of *Harrington* in essentially two ways. First, he suggests that this Court's decision in *Davis* v. *Alaska* forecloses application of harmless-error analysis to the particular sort of Confrontation Clause violation involved here, citing the following language near the end of the Court's opinion:

> "[Davis] was thus denied the right of effective cross-examination which '"would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Brookhart* v. *Janis,* 384 U. S.

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[5] *Bruton* had held that the receipt at a joint trial of the incriminating statement of a nontestifying codefendent deprived Bruton of his right to cross-examine an adverse witness. In *Harrington,* the trial court admitted the pretrial statements of two codefendants who did not testify. The statements implicated Harrington by placing him at the scene of the robbery, and their admission plainly violated *Bruton.* This Court nevertheless affirmed Harrington's conviction, over his objection that *Bruton* error could never be harmless. Noting that the wrongfully admitted evidence was cumulative and that the untainted proof of the defendant's guilt was overwhelming, the Court concluded that the error was harmless beyond a reasonable doubt. 395 U. S., at 254.

> 1, 3.'" 415 U. S., at 318 (quoting *Smith* v. *Illinois*, 390 U. S. 129, 131 (1968)).

Read properly, however, *Davis* does not support an automatic reversal rule, and the above-quoted language merely reflects the view that on the facts of that case the trial court's error had done "serious damage" to the petitioner's defense.

Davis was charged with stealing a safe from a bar. The police found the stolen safe abandoned near the home of Richard Green, who testified at trial that he had seen Davis engaged in suspicious activity near this site on the day of the crime. Defense counsel was barred from eliciting on cross-examination that Green was on juvenile probation for burglary both at the time of his pretrial identification of Davis and at the time of trial. The defense sought to suggest that Green may have slanted his account in the State's favor either to shift suspicion away from himself or to avoid revocation of probation for failing to "cooperate." 415 U. S., at 310–311. This Court reversed Davis' conviction, emphasizing that Green's tesimony was "crucial" and that there was a "real possibility" that pursuit of the excluded line of impeachment evidence would have done "[s]erious damage to the strength of the State's case." *Id.*, at 319. So despite the absence of a reference to *Chapman*, *Davis* plainly rests on the conclusion that on the facts of that case, the error might well have contributed to the guilty verdict. *Davis* should not be read as establishing, without analysis, a categorical exception to the harmless-error rule.

Respondent's second argument in support of a *per se* reversal rule is that the Confrontation Clause error in this case, which like *Davis* involved the *exclusion* of evidence, is analytically distinct from that in *Harrington* v. *California*, which involved the erroneous *admission* of harmless testimony. Because it is impossible to know how wrongfully excluded evidence would have affected the jury, the argument runs, reversal is mandated. But *Harrington* cannot be so easily dispatched. Respondent, like Harrington, was denied an opportunity to cast doubt on the testimony of an adverse witness.[6] In both cases the prosecution was thus able to introduce evidence that was not subject to constitutionally adequate cross-examination. And in both cases the reviewing court should be able to decide whether the not-fully-impeached evidence might have affected the reliability of the factfinding process at trial.

Accordingly, we hold that the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to *Chapman* harmless-error analysis. The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. Cf. *Harrington*, 395 U. S., at 254; *Schneble* v. *Florida*, 405 U. S., at 432.

We believe that the determination whether the Confrontation Clause error in this case was harmless beyond a reasonable doubt is best left to the Delaware Supreme Court in the first instance. Accordingly, that court's judgment is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE WHITE, concurring in the judgment.

The Sixth Amendment confers on defendants in criminal cases the right "to be confronted with the witnesses against" them. The Court has interpreted these words as meaning more than being allowed to confront the witnesses physically, more than the right to be tried by live testimony rather than affidavits. It includes the opportunity for effective cross-examination of the State's witnesses. I do not here dispute these interpretations of the constitutional language; but they neither require nor advise the Court to hold, as it does today, that the Amendment is violated whenever a trial judge limits cross-examination of a particular witness and the jury might have received a significantly different impression of the witness' credibility had cross-examination not been curtailed, even if the limitation and its consequences could not possibly have had any effect on the outcome of the trial.

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[6] Respondent does not contend that he was denied the opportunity to elicit exculpatory evidence from Fleetwood.

It makes much more sense to hold that no violation of the Confrontation Clause has occurred unless there is some likelihood that the outcome of the trial was affected. I agree that the Delaware Court erred and that we should remand for consideration of prejudice, but I would not now hold that a constitutional violation occurred. If it is ultimately held that the outcome would have been the same whether or not cross-examination had been limited, no Sixth Amendment violation occurred in this case.

I would thus treat this claim of a Sixth Amendment violation just as the majority would treat limitations on cross-examination that would fall within the trial judge's "wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on . . . cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Ante*, at 679. These "reasonable" limitations are not violations at all, obviously because they can have no impact on the fairness of the trial. Yet the curtailment of cross-examination imposed in this case is said to be unreasonable and an infraction of the Amendment even though it may be held beyond reasonable doubt that it had no impact whatsoever on the result the jury reached.

No judge welcomes or can ignore being told that he committed a constitutional violation, even if the conviction is saved by a harmless-error finding. Being advised by the Court that there is an area of cross-examination curtailment that is not only harmless but not a constitutional violation but at the same time an area of curtailment that even though harmless is an infraction of our fundamental charter, the judge will surely tend to permit the examination rather than risk being guilty of misunderstanding the constitutional requirements of a fair trial. I would not so undermine the authority of the judge to restrict cross-examination in a manner having no appreciable impact on the reliability of the outcome, particularly since the language and purpose of the specific provision at issue do not otherwise dictate.

Even if it is ultimately held in this case that the error was harmless, as the Court is quite willing to assume will be the case, the judge has been declared derelict and commanded not again to restrict cross-examination in this manner even though he is convinced, and rightly so, that it has no significance whatsoever in terms of the outcome of the trial. With all due respect, I cannot join the Court's opinion.

JUSTICE MARSHALL, dissenting.

The Court today properly holds that a complete denial of cross-examination designed to explore the bias of a prosecution witness violates the Confrontation Clause, whether or not the denial influenced the outcome of the trial and whether or not the witness was important to the prosecution's case. Nevertheless, the Court remands in order to permit the state court to apply harmless-error analysis to that violation. I must respectfully dissent from the latter part of the Court's holding. I believe that the importance of cross-examination to a criminal trial is so great that a complete denial of otherwise proper cross-examination concerning the potential bias of a prosecution witness should lead to no less than a reversal of the conviction.

In holding the Confrontation Clause applicable to the States, this Court referred to the right of cross-examination as "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer* v. *Texas*, 380 U. S. 400, 405 (1965). If indeed the harmless-error doctrine focuses on the fairness and accuracy of a criminal trial, see *ante*, at 681, it is odd that the majority so easily applies it to a type of error that calls both fairness and accuracy into question to an almost unique degree.

The centrality of cross-examination to the factfinding process makes it particularly unlikely that an appellate court can determine that a denial of cross-examination had no effect on the outcome of a trial.

> "[T]he court ordinarily cannot measure whether harm has ensued to an appellant when he has been denied the opportunity to cross-examine witnesses against him, given all the risks. Had cross-examination been allowed, for example, it might have served to impeach a witness and thus to cast doubt on corroborating testimony, or it might have elicited exculpatory evidence. Only on rare occasions will an appellate court be able to find that the testimony of the witness was so tangential, or so well corroborated, or so clearly invulnerable to attack that the denial of the right to cross-examination was harmless." R. Traynor, The Riddle of Harmless Error 68–69 (1970).

The fact that a particular witness' testimony was corroborated cannot render harmless a denial of the right to expose his bias. Defense counsel may have valid strategic reasons for challenging one witness' testimony aggressively while treating a corroborating witness more gently. Jurors evaluating the witnesses' demeanor may choose to give great weight to the testimony of one witness while ignoring the similar testimony of another. In either event, denial of cross-examination concerning a witness' bias may deprive the defense of its best opportunity to expose genuine flaws in the prosecution's case—flaws that the cold record will not reveal to an appellate court.

Indeed, an appellate court attempting to apply harmless-error analysis is faced with a formidable burden. The court cannot merely satisfy itself that the jury would have reached the same result had the witness in question not appeared at all; it must be convinced beyond a reasonable doubt that the jury would have reached the same result even if cross-examination had led the jury affirmatively to believe that the witness was lying. Moreover, the court must conclude, beyond a reasonable doubt, that no evidence exculpatory to the defendant could have emerged from a genuinely adversarial testing of the witness. I think that a court can make such a determination only in the rarest of circumstances, and a rule of *per se* reversal is therefore justified.

The Confrontation Clause violation in this case is especially pernicious. The jury was essentially misled, by the empty gesture of cross-examination, to believe that the defense attorney had been permitted to use all the tools at his disposal to expose weaknesses in Fleetwood's testimony. Having survived what appeared to be counsel's best efforts to undermine the witness' credibility, Fleetwood's testimony necessarily carried more weight with the jury than would the same testimony given without an apparent opportunity to cross-examine.

This analysis makes it unnecessary to strain, as does the majority, to reconcile the apparent *per se* rule of *Davis* v. *Alaska*, 415 U. S. 308 (1974), with the harmless-error analysis employed in *Harrington* v. *California*, 395 U. S. 250 (1969), and *Schneble* v. *Florida*, 405 U. S. 427 (1972). I would simply hold that *Davis* mandates reversal whenever the prosecution puts a witness on the stand but the court does not permit the defense to cross-examine concerning relevant potential bias. I therefore dissent from the Court's decision to permit the Delaware Supreme Court to apply harmless-error analysis to the Confrontation Clause violation in this case.

I also write to emphasize that this Court cannot *require* state courts to apply harmless-error analysis to violations of the Federal Constitution. See *Connecticut* v. *Johnson*, 460 U. S. 73, 88 (1983) (STEVENS, J., concurring in judgment). While this Court has stated that federal law governs the application of harmless error to violations of the Federal Constitution, see *Chapman* v. *California*, 386 U. S. 18, 21 (1967), that cannot mean more than that state courts *must* reverse convictions when the Constitution so mandates. When the Constitution does not mandate a particular remedy, this Court may not "declare which of many admittedly constitutional [remedial] alternatives a State may choose." *Id.*, at 48 (Harlan, J., dissenting) (footnote omitted). We have never held that the Federal Constitution forbids state courts to reverse certain convictions pursuant to state substantive or procedural law, nor can I imagine what provision of the Constitution could grant us such a power. Thus the Delaware Supreme Court remains free on remand to decide that even though it applied the substantive standards of the Sixth Amendment to determine whether error occurred, its harmless-error analysis was the product of state rather than federal law.

JUSTICE STEVENS, dissenting.

The Court finds the way open to reverse the judgment in this case because "[t]he opinion of the Delaware Supreme Court, which makes use of both federal and state cases in its analysis, lacks the requisite 'plain statement' that it rests on state grounds." *Ante*, at 678, n. 3.[1] In so holding, the Court continues down the path it marked in *Michigan* v. *Long*, 463 U. S. 1032, 1037–1044 (1983), when it announced that it would henceforth presume jurisdiction to review state-court judgments absent a "plain statement" that such judgments rest on state grounds.[2]

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[1] A determination that a state-court judgment rests on a federal ground is a prerequisite to the exercise of our jurisdiction in such a case. See *Fox Film Corp.* v. *Muller*, 296 U. S. 207, 210 (1935) ("[W]here the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment");

Despite the directness of the route chosen, today's destination was not foreordained. Unlike *Michigan* v. *Long*, this case concerns whether the Court should presume jurisdiction to review a state supreme court's *remedy* for a federal constitutional violation. Since courts have traditionally enjoyed broad discretion to fashion remedies—even remedies forbidding otherwise lawful acts—once a constitutional violation

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Murdock v. *City of Memphis*, 20 Wall. 590, 626, 633, 641 (1875) (construing requirement as part of jurisdictional statute). See also Sandalow, Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine, 1965 S. Ct. Rev. 187, 188–189, and n. 6 (discussing possible constitutional basis for the adequate and independent state ground rule).

[2] The principal question in *Michigan* v. *Long* was whether a state court's determination that a search violated the State Constitution was independent of its conclusion that it violated the Federal Constitution. The Court surveyed the various approaches, decided that "none of [them] thus far recommends itself as the preferred method," 463 U. S., at 1039, and then selected the presumption it did as the most administrable of the available choices, *id.*, at 1041. I agreed with the Court that "we are left with a choice between two presumptions: one in favor of our taking jurisdiction, and one against it," *id.*, at 1066, but explained that "in reviewing the decisions of state courts, the *primary*"—although not exclusive—"role of this Court is to make sure that persons who seek to *vindicate* federal rights have been fairly heard," *id.*, at 1068 (first emphasis added). See *Florida* v. *Meyers*, 466 U. S. 380, 385 (1984) (STEVENS, J., dissenting) ("But we must not forget that a central purpose of our written Constitution, and more specifically of its unique creation of a life-tenured federal judiciary, was to ensure that certain rights are firmly secured *against* possible oppression by the Federal or State Governments"). Compare the *Michigan* v. *Long* Court's misreading of my dissent as "propos[ing] the novel view that this Court should *never* review a state court decision unless the Court wishes to vindicate a federal right that has been endangered." 463 U. S., at 1043, n. 8 (emphasis added).

has been proved,[3] the more logical direction would have been to presume that a state court is merely exercising its normal supervisory power over state officials unless it clearly states that federal law requires a particular procedure to be followed. The Court's contrary presumption works a further advancement of its own power, but it flouts this Court's best traditions: it deviates from our normal approach to questions of subject-matter jurisdiction, and it departs from our longstanding practice of reserving decision on federal constitutional law. Even considered purely from the standpoint of managing our own discretionary docket, the Court's presumption includes a selection bias inconsistent with the lessons of history as revealed in this Court's statutory jurisdiction over the judgments of state courts. Finally, the Court's willingness to presume jurisdiction to review state remedies evidences a lack of respect for state courts and will, I fear, be a recurrent source of friction between the federal and state judiciaries.

I

The rules that govern this Court's jurisdiction to review state-court judgments should, of course, be consistent with the jurisdictional principles that govern the entire federal judicial system. Indeed, because the example that this Court sets for the entire system inevitably affects the way in which all federal judges tend to evaluate their own powers, we have a special obligation to make sure that our conclusions concerning our own jurisdiction rest on a firm and legitimate foundation.

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[3] See, *e. g.*, *Teachers* v. *Hudson*, *ante*, at 309–310, n. 22, and cases cited therein. As I explained in my opinion concurring in the judgment in *Connecticut* v. *Johnson*, 460 U. S. 73, 88 (1983) (footnotes omitted):

"If federal constitutional error occurs in a state criminal trial, federal law places certain limits on the state appellate court's disposition of the case. If the error is sufficiently grievous, it *must* reverse. If the error is less grievous, it also must reverse unless it declares its conviction beyond a reasonable doubt that the federal error was harmless. But federal law does not *require* a state appellate court to make a harmless-error determination; it merely *permits* the state court to do so in appropriate cases. This is all the Court held in *Chapman* v. *California*, 386 U. S. 18 (1967)."

JUSTICE MARSHALL is therefore quite right to point out that "this Court cannot *require* state courts to apply harmless-error analysis to violations of the Federal Constitution." *Ante*, at 689.

In origin and design, federal courts are courts of limited jurisdiction; they exercise only the authority conferred on them by Art. III and by congressional enactments pursuant thereto. See *Bender* v. *Williamsport Area School Dist.*, *ante*, at 541, and cases cited therein. Like all other federal courts, this Court has only the power expressly given it. Because it is our inescapable duty—in contrast to that of the political branches—to construe authoritatively the very instruments which define and limit that power, the Court early in its history wisely adopted a presumption that every federal court is "without jurisdiction" unless "the contrary appears affirmatively from the record." *King Bridge Co.* v. *Otoe County*, 120 U. S. 225, 226 (1887). Accord, *Thomas* v. *Board of Trustees*, 195 U. S. 207, 210 (1904); *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 62–63 (1904). That presumption is just as "inflexible" in this Court as in any other federal court.[4]

Even for cases unquestionably within this Court's subject-matter jurisdiction, we have disclaimed any pretension to reach questions arising under the Federal Constitution when an alternative basis of decision fairly presented itself. Thus, in one of the most respected opinions ever written by a Member of this Court, Justice Brandeis wrote:

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[4] Cf. *Mansfield C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379, 382 (1884) ("[T]he rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it").

> "The Court [has] developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. They are:
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> ". . . The Court will not pass upon a [federal] constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Ashwander* v. *TVA*, 297 U. S. 288, 346–347 (1936) (concurring opinion).[5]

The Court has remained faithful to these basic tenets when it is reviewing cases that arise in the federal system. See *Bender* v. *Williamsport Area School Dist.*, *ante*, at 545–549; *Regents of University of Michigan* v. *Ewing*, 474 U. S. 214, 222–223 (1985). Ironically, however—and contrary to tradition[6]—the Court has taken a different stance when it is asked to review cases coming to us from state courts. Although "[w]e cannot perform our duty to refrain from interfering in state law questions and also to review federal ones without making a determination whether the one or the other controls the judgment," *Herb* v. *Pitcairn*, 324 U. S. 117, 125–126 (1945), the jurisdictional precepts that serve us so well in reviewing judgments rendered in federal court merit observance in review of state-court judgments too. Abjuring the federal analogy, the Court unwisely marks for special scrutiny the decisions of courts to which I believe it owes special respect.

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[5] See, *e. g.*, *Siler* v. *Louisville & Nashville R. Co.*, 213 U. S. 175, 193 (1909) (duty of the Federal District Court to decide first a question of state law, over which it has merely pendent jurisdiction, in order to avoid if possible a federal constitutional question); *Santa Clara County* v. *Southern Pacific R. Co.*, 118 U. S. 394, 410–411, 416–417 (1886). *Pennhurst State School & Hospital* v. *Halderman*, 465 U. S. 89 (1984), did not qualify this avoidance principle; it held only that the Eleventh Amendment proscribed the award of injunctive relief for violations of state law in certain cases, thereby removing the basis for avoiding decision of federal constitutional questions in this class of cases. See *id.*, at 119, n. 28 ("Nothing in our decision is meant to cast doubt on the desirability of applying the *Siler* principle in cases where the federal court has jurisdiction to decide the state-law issues").

[6] The Court's time-honored "policy of strict necessity in disposing of [federal] constitutional issues," by which "constitutional issues . . . will not

II

The jurisdictional presumption that the Court applies—and extends—today harbors a hidden selection bias that in turn reveals a disturbing conception of this Court's role. Because a state ground can only support a judgment *consistent* with a

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be determined if the record presents some other ground upon which the case may be disposed of," *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 568, 569 (1947), received one of its most forceful expositions in an appeal from a judgment rendered by a state court:

> "[T]he policy . . . is one of substance, grounded in considerations which transcend all such particular limitations. Like the case and controversy limitation itself and the policy against entertaining political questions, it is one of the rules basic to the federal system and this Court's appropriate place within that structure.
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> . . . . .
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> "The policy's ultimate foundations, some if not all of which also sustain the jurisdictional limitation, lie in all that goes to make up the unique place and character, in our scheme, of judicial review of governmental action for constitutionality. They are found in the delicacy of that function, particularly in view of possible consequences for others stemming also from constitutional roots; the comparative finality of those consequences; the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority; the necessity, if government is to function constitutionally, for each to keep within its power, including the courts; the inherent limitations of the judicial process, arising especially from its largely negative character and limited resources of enforcement; withal in the paramount importance of constitutional adjudication in our system." *Id.*, at 568–571 (footnotes omitted).

federal claim, the Court's jurisdictional presumption operates to expand this Court's review of state remedies that overcompensate for violations of federal constitutional rights. Historically, however, such cases have been outside the province of this Court. For well over a century the Judiciary Act of 1789 denied this Court authority to review state-court judgments upholding federal claims.[7] By conferring no power to review these judgments, "the first Congress assembled under the Constitution"—whose Members had "taken part in framing that instrument," *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 297 (1888), in addition to having enacted the First Judiciary Act—codified their conviction that this Court's overriding concern was to ensure that state courts respect federal rights. Only in 1914 did Congress authorize this Court to take jurisdiction over state-court judgments upholding claims of federal constitutional right, Act of Dec. 23, 1914, 38 Stat. 790, and even that legislation reflected an understanding that the Court's role is primarily to vindicate such rights.[8] Most of the bills on this subject gave "the litigant an absolute right to appeal or take a writ of error to

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[7] Section 25 of the Act of Sept. 24, 1789, 1 Stat. 85–86, as the First Judiciary Act was also known, provided for review only if the validity of a treaty or of a federal or state statute or "authority," or the construction of a federal treaty, statute, or commission of the Constitution was drawn in question, and then only if "the decision [was] against their validity" or "against the title, right, privilege or exemption" claimed.

In 1867 the post-Civil War Congress, which was not overly concerned with state sovereignty, revised the section to allow review without respect to questions of validity or construction, "where any title, right, privilege, or immunity is claimed under the constitution, or any treaty or statute of or commission held, or authority exercised under the United States." Act of Feb. 5, 1867, § 2, 14 Stat. 386. The question raised by this amendment, however, was not whether the Court could or should review state-court decisions in favor of federal constitutional claims, but whether the amendment had effected an implied repeal of the doctrine that the Court could review only *federal* questions in cases subject to review—a question answered emphatically in the negative in *Murdock* v. *Memphis*, 20 Wall. 590 (1875). (According to Professor Charles Warren, it is "highly probable" that Congress actually meant to provide that "every question passed on by the State Court should be open for reconsideration in the Supreme Court." 2 C. Warren, The Supreme Court in United States History 682 (rev. ed. 1926)).

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[8] The legislation was a response to the New York Court of Appeals' *Lochner*-style substantive due process decision in *Ives* v. *South Buffalo R. Co.*, 201 N. Y. 271, 94 N. E. 431 (1911). See, *e. g.*, S. Rep. No. 161, 63d Cong., 2d Sess., 2 (1914); H. R. Rep. No. 1222, 63d Cong., 3d Sess., 2–3 (1914); 52 Cong. Rec. 276 (1914) (remarks of Rep. Webb). In the *Ives* case, the Court of Appeals held New York's newly enacted workmen's compensation statute unconstitutional because it imposed on the railroad the obligation to pay for injuries for which it was not at fault. 201 N. Y., at 292–317, 94 N. E., at 439–449. By the 1914 legislation Congress intended to redress a seeming discrimination in favor of railroads and other large economic interests which, under the virulent substantive due process doctrine of the day, could obtain review of challenges to state reform legislation in the Supreme Court if they lost in the highest state court, but whose judgment in state court was protected from review in the Supreme Court if it won. See, *e. g.*, 52 Cong. Rec., *supra*, at 277 (remarks of Rep. Volstead) ("The cases that are taken to the courts for the purpose of having a statute declared unconstitutional are, I believe, in the great majority of cases, taken there by the large corporate interests. . . . If they succeed in having those laws set aside in a State court, that ends it under the law as it now stands. The other side can not appeal. If they fail to have the statute declared void in a State court, they can appeal to the Supreme Court of the United States and have another chance there to effect their purpose. . . . We ought to allow equal treatment to all parties and not favor these large interests"). See also H. R. Rep. No. 1222, *supra*, at 2–3; 52 Cong. Rec., *supra*, at 276 (remarks of Rep. Webb); *ibid.* (quoting letter from Mr. Wheeler of New York); *id.*, at 277 (remarks of Rep. Lewis).

Although Congress' response to the *Ives* case demonstrates that there are cases in which a state court's judgment vindicating a federal claim merits review, that view is perfectly consistent with the traditional understanding that the primary function of this Court is to review decisions rejecting such claims. Indeed, the facts of *Ives* belie any suggestion that Congress intended searching review of state-court decisions upholding claims of federal right. The workmen's compensation legislation was of exceptional importance to the State of New York, as attested to by the fact that it represented the labor of a 14-person commission chaired by a United States Senator, 201 N. Y., at 284, 94 N. E., at 435–436, and was "based upon a most voluminous array of statistical tables, extracts from the works of philosophical writers and the industrial laws of many countries, all of the Supreme Court . . . even though the decision is in favor of a claim of right under the Federal Constitution." S. Rep. No. 161, 63d Cong., 2d Sess., 2 (1914). Rather than adopt these bills, which would have placed uniformity of federal law on a par with vindication of federal rights by making review of such judgments at least nominally mandatory, Congress "substitute[d] a grant of jurisdiction to the Supreme Court of the United States to issue a writ of certiorari or otherwise to review the decision of the State court." *Ibid.* Compare Act of Sept. 24, 1789, § 25, 1 Stat. 85–86, with Act of Dec. 23, 1914, 38 Stat. 790. Thus, although this Court now has the power to review decisions defending federal constitutional rights, the claim of these cases on our docket is secondary to the need to scrutinize judgments disparaging those rights.[9]

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which are designed to show that our own system of dealing with industrial accidents is economically, morally and legally unsound," *id.*, at 287, 94 N. E., at 437. (In response to *Ives* the people of New York amended their Constitution to allow for legislation of this kind. S. Rep. No. 161, *supra*, at 2; H. R. Rep. No. 1222, *supra*, at 3.) Not only was this particular statute of great concern to New York, but the constitutionality of legislation of this kind was unsettled: "Similar laws were held constitutional in New Jersey, the State of Washington, and some other States." H. R. Rep. No. 1222, *supra*, at 2. See 52 Cong. Rec., *supra*, at 276 (remarks of Rep. Webb) (New Jersey).

[9] There is strong scholarly support for this view. For example, Dean Choper "submits that the essential role of judicial review in our system is to prevent violations of that category of constitutional provisions that secure individual liberties." J. Choper, Judicial Review and the National Political Process 2 (1980). See *id.*, at 64–65.

Professor Dworkin makes a similar point:

"The institution of rights against the Government is not a gift of God, or an ancient ritual, or a national sport. It is a complex and troublesome practice that makes the Government's job of securing the general benefit more difficult and more expensive, and it would be a frivolous and wrongful practice unless it served some point. Anyone who professes to take rights seriously, and who praises our Government for respecting them, must have some sense of what that point is. He must accept, at the minimum, one or both of two important ideas. The first is the vague but powerful idea of human dignity. This idea, associated with Kant, but defended by philoso-

When the state-court decision to be reviewed is ambiguous, and it is not even clear that the judgment rests on a federal ground, the basis for exercising jurisdiction is even less tenable.

III

The Court's decision to monitor state-court decisions that may or may not rest on nonfederal grounds is not only historically disfavored but risks the very confrontations and tensions a more humble jurisdictional stance would avoid. The presumption applied today allocates the risk of error in favor of the Court's power of review; as a result, over the long run

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phers of different schools, supposes that there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community, and holds that such treatment is profoundly unjust.

"The second is the more familiar idea of political equality. This supposes that the weaker members of a political community are entitled to the same concern and respect of their government as the more powerful members have secured for themselves, so that if some men have freedom of decision whatever the effect on the general good, then all men must have the same freedom. I do not want to defend or elaborate these ideas here, but only to insist that anyone who claims that citizens have rights must accept ideas very close to these.

"It makes sense to say that a man has a fundamental right against the Government, in the strong sense, like free speech, if that right is necessary to protect his dignity, or his standing as equally entitled to concern and respect, or some other personal value of like consequence. It does not make sense otherwise.

"So if rights make sense at all, then the invasion of a relatively important right must be a very serious matter. It means treating a man as less than a man, or as less worthy of concern than other men. The institution of rights rests on the conviction that this is a grave injustice, and that it is worth paying the incremental cost in social policy or efficiency that is necessary to prevent it. But then it must be wrong to say that inflating rights is as serious as invading them. If the Government errs on the side of the individual, then it simply pays a little more in social efficiency than it has to pay; it pays a little more, that is, of the same coin that it has already decided must be spent. But if it errs against the individual it inflicts an insult upon him that, on its own reckoning, it is worth a great deal of that coin to avoid." R. Dworkin, Takings Rights Seriously 198–199 (1977).

the Court will inevitably review judgments that in fact rest on adequate and independent state grounds. Even if the Court is unconcerned by the waste inherent in review of such cases, even if it is unmoved by the incongruity between the wholly precatory nature of our pronouncements on such occasions and Art. III's prohibition of advisory opinions, it should be concerned by the inevitable intrusion upon the prerogatives of state courts that can only provide a potential source of friction and thereby threaten to undermine the respect on which we must depend for the faithful and conscientious application of this Court's expositions of federal law.

Less obvious is the impact on mutual trust when the state court on remand—perhaps out of misplaced sense of duty—confines its state constitution to the boundaries marked by this Court for the Federal Constitution. In *Montana* v. *Jackson*, 460 U. S. 1030 (1983), for example, this Court vacated and remanded "for further consideration in light of *South Dakota* v. *Neville*, 459 U. S. 553 (1983)." In so doing, this Court presumed that the judgment of the Montana Supreme Court did not rest on Montana's Constitution. Justice Sheehy, joined by the author of the state court's original opinion, rather bitterly disagreed:

> "In our original opinion in this case, we had examined the rights guaranteed our citizens under state constitutional principles, in the light of federal constitutional decisions. Now the United States Supreme Court has interjected itself, commanding us in effect to withdraw the constitutional rights which we felt we should extend to our state citizens back to the limits pr[e]scribed by the federal decisions. Effectively, the United States Supreme Court has intruded upon the rights of the judiciary of this sovereign state.
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> "Instead of knuckling under to this unjustified expansion of federal judicial power into the perimeters of our state power, we should show our judicial displeasure by insisting that in Montana, this sovereign state can inter-

> pret its constitution to guarantee rights to its citizens greater than those guaranteed by the federal constitution.
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> . . . . .
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> "If a majority of this Court had the will to press the issue, we could put the question to the United States Supreme Court four-square, that this State judiciary has the right to interpret its constitution in the light of federal decisions, and to go beyond the federal decisions in granting and preserving rights to its citizens under its state constitution." *State* v. *Jackson*, 206 Mont. 338, 349–351, 672 P. 2d 255, 260–261 (1983) (Sheehy, J., dissenting).

See *id.*, at 357–358, 672 P. 2d, at 264–265 (Shea, J., dissenting).

The Court's two-sentence analysis notwithstanding, one cannot be confident that we have not trenched on state prerogatives in this very case. Here, the Delaware Supreme Court applied a rule reversing convictions when the defendant had been totally denied the right to cross-examine a witness for bias. The rule was expressly found to be "consistent with *Davis* v. *Alaska*, 415 U. S. 308 (1974) *and with our ruling in Weber* [v. *State*, 457 A. 2d 674 (1983),] for determining whether a violation of the confrontation clause is harmless." 486 A. 2d 1, 7 (1984) (emphasis added and citations omitted). *Weber* itself emphasized that "[b]oth the United States and Delaware Constitutions guarantee the right of a defendant to confront the witnesses against him. U. S. Const. amend. VI; Del. Const. art. I, § 7." *Weber* v. *State*, 457 A. 2d, at 682 (footnote omitted). At no point did the Delaware Supreme Court imply that it reversed the defendant's conviction only because that result was compelled by its understanding of federal constitutional law; rather, the conclusion that its rule was "consistent with" a case of this Court construing the federal Confrontation Clause suggests that it was interested merely in respecting the bounds of federal law as opposed to carrying out its command. The Court rewards the Delaware Supreme Court's circumspection by unceremoniously reversing its judgment.

IV

I agree with JUSTICE MARSHALL that "the Delaware Supreme Court remains free on remand to decide that . . . its harmless-error analysis was the product of state rather than federal law." *Ante*, at 689. Because the Court's approach does nothing to minimize, and indeed multiplies, future occasions on which state courts may be called upon to clarify whether their judgments were in fact based on state law, it is appropriate to amplify the opinion I expressed in *Massachusetts* v. *Upton*, 466 U. S. 727, 736 (1984) (concurring in judgment), that the proper "sequence of analysis when an arguable violation of the State Constitution is disclosed by the record" is for the state court to consider the state constitutional claim in advance of any federal constitutional claim. In that case, I described the Oregon Supreme Court's practice of considering state constitutional claims before reaching issues of federal constitutional law:

> "'The proper sequence is to analyze the state's law, including its constitutional law, before reaching a federal constitutional claim. This is required, not for the sake either of parochialism or of style, but because the state does not deny any right claimed under the federal Constitution when the claim before the court in fact is fully met by state law.' *Sterling* v. *Cupp*, 290 Ore. 611, 614, 625 P. 2d 123, 126 (1981)." *Massachusetts* v. *Upton*, 466 U. S., at 736.[10]

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[10] "[T]he basis for th[e] claim in the state constitution should be examined first, before any issue under the federal fourteenth amendment. To begin with the federal claim, as is customarily done, implicitly admits that the guarantees of the state's constitution are ineffective to protect the asserted right and that only the intervention of the federal constitution stands between the claimant and the state. . . . [I]nsofar as the federal fourteenth amendment is invoked to apply the federal Bill of Rights against state action, particularly in the fields of freedom of ideas, criminal proce-

Since that time, at least four other state courts have expressly endorsed the practice of considering state constitutional claims first.[11] In response to *Michigan* v. *Long*, 463

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dure, and compensation for the taking of property, there is no reason to accept such an assumption that the values enshrined in a state's constitution, in, say, 1859, must today fall short of those in the federal Bill of Rights of 1789. And to add a reference to the corresponding state provision as an afterthought to a holding under the federal guarantee is worse than merely backwards: A holding that a state constitutional provision protects the asserted claim in fact destroys the premise for a holding that the state is denying what the federal Constitution would assure." Linde, Without "Due Process", 49 Ore. L. Rev. 125, 182 (1970).

Accord, Linde, E Pluribus—Constitutional Theory and State Courts, 18 Ga. L. Rev. 165, 178 (1984) ("My own view has long been that a state court always is responsible for the law of its state before deciding whether the state falls short of a national standard, so that no federal issue is properly reached when the state's law protects the claimed right" (footnote omitted)); Linde, First Things First: Rediscovering the States' Bills of Rights, 9 U. Balt. L. Rev. 379, 383 (1980) ("Just as rights under the state constitutions were first in time, they are first also in the logic of constitutional law"). For thoughtful discussion of other views, see Utter, Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues when Disposing of Cases on State Constitutional Grounds, 63 Texas L. Rev. 1025 (1985) (advocating that state courts comment on federal issues even in cases decided on state constitutional grounds); Developments in the Law—The Interpretation of State Constitutional Rights, 95 Harv. L. Rev. 1324, 1356–1367 (1982) (contending that state constitutions should be used only to supplement individual rights in the event that protection under the Federal Constitution is unavailable).

[11] See, *e. g.*, *Large* v. *Superior Court*, 148 Ariz. 229, 235, 714 P. 2d 399, 405 (1986) ("Because petitioner did not articulate whether he was proceeding under the federal or state due process clause, and because the provisions of our state constitution settle the matter, we address only the state constitutional issue. In construing the Arizona Constitution we refer to federal constitutional law only as the benchmark of minimum constitutional protection" (citations omitted)); *City of Portland* v. *Jacobsky*, 496 A. 2d 646, 648 (Me. 1985) ("Just as we avoid expressing opinions on constitutional questions when the issue before us on appeal may be otherwise resolved, a similar policy of judicial restraint impels us to forbear from ruling on federal constitutional questions when the provisions of our state constitution may settle the matter" (citations omitted)); *State* v. *Chaisson*,

U. S. 1032 (1983), for example, the New Hampshire Supreme Court concluded:

> "When a defendant, as in this case, has invoked the protections of the New Hampshire Constitution, we will first address these claims.

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125 N. H. 810, 814–815, 486 A. 2d 297, 301 (1984) ("Next, the defendant contends that his warrantless arrest violated both the Federal and the State Constitutions and that the fruits of that arrest, therefore, should have been suppressed at trial. We, of course, address the State constitutional issues first. In construing the State constitution, we refer to Federal constitutional law as only the benchmark minimum constitutional protection" (citations omitted)); *State* v. *Coe*, 101 Wash. 2d 364, 373–374, 679 P. 2d 353, 359 (1984) ("Whether the prior restraint was constitutionally valid or invalid should be treated first under our state constitution, for a number of reasons. First, state courts have a duty to independently interpret and apply their state constitutions that stems from the very nature of our federal system and the vast differences between the federal and state constitutions and courts. Second, the histories of the United States and Washington Constitutions clearly demonstrate that the protection of the fundamental rights of Washington citizens was intended to be and remains a separate and important function of our state constitution and courts that is closely associated with our sovereignty. By turning to our own constitution first we grant the proper respect to our own legal foundations and fulfill our sovereign duties. Third, by turning first to our own constitution we can develop a body of independent jurisprudence that will assist this court and the bar of our state in understanding how that constitution will be applied. Fourth, we will be able to assist other states that have similar constitutional provisions develop a principled, responsible body of law that will not appear to have been constructed to meet the whim of the moment. Finally, to apply the federal constitution before the Washington Constitution would be as improper and premature as deciding a case on state constitutional grounds when statutory grounds would have sufficed, and for essentially the same reasons"). See also Collins, Reliance on State Constitutions: Some Random Thoughts, 54 Miss. L. J. 371, 389–394, and nn. 56–58, 69–72 (1984) (citing cases). See generally Abrahamson, Criminal Law and State Constitutions: The Emergence of State Constitutional Law, 63 Texas L. Rev. 1141, 1157–1158, n. 54 (1985) (discussing practice in state courts generally).

To implement this practice of considering state constitutional issues in advance of federal ones, state high courts have directed parties to file supplemental briefs illuminating possible state constitutional bases of decision

> ". . . We live under a unique concept of federalism and divided sovereignty between the nation and fifty States. The New Hampshire Constitution is the fundamental charter of our State. The sovereign people gave limited powers to the State government, and the Bill of Rights in part I of the New Hampshire Constitution protects the people from governmental excesses and potential abuses. When State constitutional issues have been raised, this court has a responsibility to make an independent determination of the protections afforded in the New Hampshire Constitution. If we ignore this duty, we fail to live up to our oath to defend our constitution and we help to destroy the federalism that must be so carefully safeguarded by our people. The Supreme Court of the State of Oregon recently recognized this responsibility and stated:
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> "'The point is . . . that a state's constitutional guarantees . . . were meant to be and remain genuine guarantees against misuse of the state's governmental powers, truly independent of the rising and falling tides of federal case law both in method and specifics. State courts cannot abdicate their responsibility for these independent guarantees, at least not unless the people of the State themselves choose to abandon them and entrust their rights entirely to federal law.' *State* v. *Kennedy*, 295 Or. 260, 271, 666 P. 2d 1316, 1323 (1983)." *State* v. *Ball*, 124 N. H. 226, 231, 471 A. 2d 347, 350 (1983).

Since 1983, in over a dozen cases,[12] the New Hampshire Supreme Court has thereby averted unnecessary disquisitions on the meaning of the Federal Constitution.

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when the initial briefings have neglected such issues. See *State* v. *Kennedy*, 295 Ore. 260, 268, 666 P. 2d 1316, 1321 (1983). Cf. *State* v. *Jewett*, 146 Vt. 221, 222, 500 A. 2d 233, 234 (1985).

[12] See *Hopps* v. *State Bd. of Parole*, 127 N. H. 133, 135, 500 A. 2d 355, 356 (1985); *State* v. *Cooper*, 127 N. H. 119, 122, 498 A. 2d 1209, 1212 (1985); *State* v. *Dayutis*, 127 N. H. 101, 105, 498 A. 2d 325, 328 (1985); *State ex rel.*

The emerging preference for state constitutional bases of decision in lieu of federal ones is, in my view, the analytical approach best suited to facilitating the independent role of state constitutions and state courts in our federal system. There is much wisdom in THE CHIEF JUSTICE's admonition that "State courts . . . are responsible first for resolving issues arising under their constitutions and statutes and then for passing on matters concerning federal law." Year-End Report on the Judiciary 18 (1981).

It must be remembered that every State but Rhode Island had a written constitution by the close of the Revolutionary War in 1783. "[F]or the first century of this Nation's history, the Bill of Rights of the Constitution of the United States was solely a protection for the individual in relation to federal authorities. State Constitutions protected the liberties of the people of the several States from abuse by state authorities." *Massachusetts* v. *Upton*, 466 U. S., at 738–739 (STEVENS, J., concurring in judgment). The independent significance of state constitutions clearly informed this Court's conclusion, in *Barron* v. *The Mayor and City Council of Baltimore*, 7 Pet. 243, 247–248 (1833), that the Bill of Rights applied only to the Federal Government:

> "The question thus presented is, we think, of great importance, but not of much difficulty.
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> "The constitution was ordained and established by the people of the United States for themselves, for their own

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McLellan v. *Cavanaugh*, 127 N. H. 33, 37, 498 A. 2d 735, 738 (1985); *State* v. *Langone*, 127 N. H. 49, 51–52, 498 A. 2d 731, 733 (1985); *State* v. *Corey*, 127 N. H. 56, 57, 497 A. 2d 1196, 1197 (1985); *State* v. *Faragi*, 127 N. H. 1, 4–5, 498 A. 2d 723, 726 (1985); *State* v. *Camargo*, 126 N. H. 766, 769, 498 A. 2d 292, 295 (1985); *State* v. *Barham*, 126 N. H. 631, 636, 495 A. 2d 1269, 1273 (1985); *State* v. *Farnsworth*, 126 N. H. 656, 659, 497 A. 2d 835, 836 (1985); *State* v. *Cimino*, 126 N. H. 570, 572, 493 A. 2d 1197, 1200 (1985); *State* v. *Cote*, 126 N. H. 514, 521–522; 493 A. 2d 1170, 1175 (1985); *State* v. *Chaisson*, 125 N. H. 810, 815, 486 A. 2d 297, 301 (1984).

> government, and not for the government of the individual states. Each state established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated.
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> ". . . In their several constitutions they have imposed such restrictions on their respective governments as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no farther than they are supposed to have a common interest."

While the holding of the *Barron* case has since been superseded by ratification of the Fourteenth Amendment and selective incorporation of the Bill of Rights, the concomitant atrophy of state constitutional theory was both unnecessary and unfortunate.[13] State constitutions preceded the Federal Constitution and were obviously intended to have independent significance.[14] The frequent amendments to state

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[13] To quote the Vermont Supreme Court:

"One longs to hear once again of legal concepts, their meaning and their origin. All too often legal argument consists of a litany of federal buzz words memorized like baseball cards. As Justice Linde has noted:

'People do not claim rights against self-incrimination, they "take the fifth" and expect "*Miranda* warnings." Unlawful searches are equated with fourth amendment violations. Journalists do not invoke freedom of the press, they demand their first amendment rights. All claims of unequal treatment are phrased as denials of equal protection of the laws.'" *State* v. *Jewett*, 146 Vt., at 223, 500 A. 2d, at 235 (footnote omitted).

[14] The early state Bills of Rights were, in fact, specifically motivated by the interest in protecting the individual against overreaching by the majority:

"In the period following independence, the state legislatures became increasingly active, enacting a great variety of laws. To many Americans much of this legislation appeared to serve the special interests of some groups at the expense of others. Moreover, much of it was thought to violate the natural rights of individuals. For example, the Pennsylvania Council of Censors issued a report in 1784 that listed many examples of legislative violations of the state constitution and bill of rights. The report showed that 'fines had been remitted, judicially established claims disalconstitutions likewise presuppose their continued importance. Thus, whether the national minimum set by the Federal Constitution is high or low, state constitutions have their own unique origins, history, language, and structure—all of which warrant independent attention and elucidation. State courts remain primarily responsible for reviewing the conduct of their own executive branches, for safeguarding the rights of their citizenry, and for nurturing the jurisprudence of state constitutional rights which it is their exclusive province to expound.[15]

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lowed, verdicts of juries set aside, the property of one given to another, defective titles secured, marriages dissolved,' and so forth. Similar abuses were also taking place in New Hampshire and other states. The injustice of these laws, as James Madison said, brought 'into question the fundamental principle of republican Government, that the majority who rule in such governments are the safest Guardians both of public Good and private rights.' By the end of the 1780's, 'the Americans' inveterate suspicion and jealousy of political power, once concentrated almost exclusively on the Crown and its agents, was transferred to the various state legislatures.'

. . . . .

"As Americans became more distrustful of democracy, Whig political theory gradually declined and Federalist theory became predominant. Americans began to impose greater restrictions on their legislatures in order to safeguard individual rights. In the 1770's and 1780's more and more rights were added to bills of rights. Moreover, the power of the legislatures to limit or alienate rights was steadily reduced. Increasingly, bills of rights became binding on legislatures. Instead of saying merely that the legislature 'ought' not abridge certain rights, bills of rights began to provide that it 'shall' not do so. The prevailing view among the Federalists was that the authority of the legislature and of government generally should extend only to a relatively narrow range of issues.

"In summary, during the revolutionary period a 'tidal-wave of democracy . . . swept over the colonies.' Thereafter, during the 1780's, those waters receded and another wave swept in: a wave of concern about protecting 'private rights against uncontrolled legislative power.'" Elfenbein, The Myth of Conservatism as a Constitutional Philosophy, 71 Iowa L. Rev. 401, 472–474 (1986).

[15] This would facilitate the work of federal courts, which under this Court's precedents must address issues of state constitutional law before considering claims under the Federal Constitution. See *City of Mesquite*

Because I would not presume that the Delaware Supreme Court failed to discharge this responsibility, I would dismiss the writ.

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v. *Aladdin's Castle, Inc.*, 455 U. S. 283, 294–295 (1982) ("[T]here is no need for decision of the federal [constitutional] issue" if the state constitution provides "independent support"); cf. *Askew* v. *Hargrave*, 401 U. S. 476, 478 (1971) (abstention under *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496 (1941)); *Reetz* v. *Bozanich*, 397 U. S. 82, 85 (1970) (same). There exists a growing recognition among Federal Courts of Appeals that it is incumbent upon them to resolve issues of state constitutional law before reaching issues arising under the Federal Constitution. See, *e. g.*, *Carreras* v. *City of Anaheim*, 768 F. 2d 1039, 1042–1043 (CA9 1985); *Seals* v. *Quarterly County Court of Madison County, Tenn.*, 562 F. 2d 390, 392 (CA6 1977).

ICICLE SEAFOODS, INC. *v.* WORTHINGTON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85-195. Argued February 25, 1986—Decided April 21, 1986

Respondents were employed by petitioner as members of the Engineering Department on board a nonself-propelled fish-processing barge. They sued petitioner in Federal District Court, seeking to recover overtime benefits under the Fair Labor Standards Act (FLSA). Finding that they were seamen because they performed work of a maritime character on navigable waters, the District Court held that respondents were excluded from such benefits under the provision of the FLSA that excludes "any employee employed as a seaman." The Court of Appeals reversed. Reviewing under a "*de novo*" standard, the Court of Appeals found that respondents' "dominant employment" was "industrial maintenance" and that the "maritime work" that they performed took only a small portion of their time, and therefore concluded that respondents were not seamen.

Held: The Court of Appeals erred in engaging in such factfinding. The facts necessary to a proper determination of the legal question whether an exemption to the FLSA applies in a particular case should be reviewed by the courts of appeals pursuant to the "clearly erroneous" standard of review set forth in Federal Rule of Civil Procedure 52(a), like the facts in other civil bench-tried litigation in federal courts. *Walling* v. *General Industries Co.*, 330 U. S. 545. Here, if the Court of Appeals believed that the District Court's factual findings were "clearly erroneous" within the meaning of Rule 52(a), it could have set them aside, whereas, if it believed that the findings were unassailable, but that the proper rule of law was not correctly applied to those findings, it could have reversed the District Court's judgment on that ground. But it should not simply have made factual findings of its own. Pp. 712–715.

774 F. 2d 349, vacated and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 715.

Clemens H. Barnes argued the cause for petitioner. With him on the briefs were *James D. Rolfe* and *Erik Rosenquist*.

Carson F. Eller argued the cause and filed a brief for respondents.*

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondents sued their employer, petitioner Icicle Seafoods, Inc., to recover overtime benefits to which they thought they were entitled under the Fair Labor Standards Act (FLSA), 29 U. S. C. § 207(a)(1). After a 2-day trial, the United States District Court for the Western District of Washington held that respondents were excluded from the overtime benefits of the FLSA by 29 U. S. C. § 213(b)(6), which excludes "any employee employed as a seaman." Reviewing this issue under a "*de novo*" standard of review, the Court of Appeals for the Ninth Circuit reversed the judgment of the District Court, holding that respondents were not "seamen," but instead were industrial maintenance employees on a barge that processed fish caught by a fishing fleet in the coastal waters of the Pacific Northwest. 774 F. 2d 349 (1985). We granted certiorari to consider whether the Court of Appeals applied the appropriate standard of review in passing on the District Court's judgment. 474 U. S. 900 (1985).

The District Court made the following pertinent findings of fact related to whether respondents were "seamen" within the meaning of § 213(b)(6):

> "2. Defendant Icicle Seafoods owned and operated a seafood processing vessel named the *ARCTIC STAR*. Each of the Plaintiffs worked for Defendant on board the *ARCTIC STAR* as members of the Engineering Department . . . . The *ARCTIC STAR* is a nonself-propelled barge which is moved from place to place with the aid of a tow boat, and is located throughout the waters of

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**Eileen Madrid* filed a brief for Maryland Casualty Co. as *amicus curiae*.

> Alaska or Washington, depending on the season and type of seafood being caught and processed.
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> . . . . .
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> "7. None of the Plaintiffs were members of the Processing Crew on board the *ARCTIC STAR*. The Processing Crew performed all the hands-on processing or packing of the fish or shellfish. Plaintiffs were members of the Engineering Department on board the *ARCTIC STAR*, considered themselves very distinct from the Processing Crew, and did not perform any hands-on processing or packing of fish or shellfish. As members of the Engineering Department, Plaintiffs were responsible for maintaining all systems for support and continuous operation of the vessel while at moorage or underway. Although working in shifts, the Plaintiffs had to be available on call 24 hours a day to perform work at a moment's notice if necessary to keep the vessel operating. Even though the plaintiffs were not licensed by the Coast Guard as engineers or members of an engineering department, each of the Plaintiffs performed tasks which conformed to those expected of Coast Guard licensed personnel. The very description of the Plaintiff's work is that of a marine engineer or member of an engineering department. In summary, each of the Plaintiffs were members of the crew of the *ARCTIC STAR* and performed work which was maritime in character and rendered while the *ARCTIC STAR* was in navigable waters. Each of the Plaintiff's employment was that of a seaman." App. A–3 to Pet. for Cert. 2–3, 5–6.

The Court of Appeals read the District Court's opinion as holding that respondents were "seamen" under § 213(b)(6) because the evidence showed that they "performed work of a maritime character on navigable waters." 774 F. 2d, at 351.

In reviewing this conclusion, the Court of Appeals initially pointed out that it and other Courts of Appeals have applied conflicting standards of review to claims of exclusion from the FLSA, and attributed these different approaches to three cases decided by this Court within a few months of each other during its October 1946 Term. *Ibid.* The Court of Appeals recognized that in *Walling* v. *General Industries Co.*, 330 U. S. 545 (1947), this Court held that whether an employee falls within the exclusion for "executives" under 29 U. S. C. § 213(a)(1) is a factual question subject to the "clearly erroneous" standard of review set forth in Rule 52(a) of the Federal Rules of Civil Procedure. 774 F. 2d, at 352. But it thought that in *Levinson* v. *Spector Motor Service*, 330 U. S. 649 (1947), and *Rutherford Ford Corp.* v. *McComb*, 331 U. S. 722 (1947), this Court appeared to apply a "*de novo*" standard of review to whether an employee falls within an exclusion for employees covered by the Motor Carrier Act and to whether someone is an independent contractor rather than an employee. 774 F. 2d, at 352. The Court of Appeals reconciled its reading of these cases on grounds that the regulations implementing the provisions at issue in *Levinson* and *Rutherford* were "illustrative and general," whereas those in *Walling* were "specific," and that the trial court's findings in *Walling* were based on the conflicting testimony of witnesses. *Ibid.*

We think that neither *Levinson* nor *Rutherford* should be read to depart from the rule laid down in *Walling*. *Levinson* involved a case that was brought to this Court from the Supreme Court of Illinois, and that court had accepted the factual findings made by the Illinois Appellate Court. But state courts are not required to apply Rule 52(a)—a rule of *federal* civil procedure—to their own appellate system for reviewing factual determinations of trial courts. *Rutherford* came up through the federal court system, and this Court held that the District Court erroneously based its conclusion that particular employees were independent contractors on "isolated factors" in the employee's relationship with the employer. 331 U. S., at 729–730. We set forth a lengthy summary of the facts without indicating the source for such a summary; but a fair reading of the opinion indicates that we were focusing on a legal question, and not on the allocation of factfinding responsibilities between district courts and courts of appeals. We therefore reaffirm our holding in *Walling* that the facts necessary to a proper determination of the legal question whether an exemption to the FLSA applies in a particular case should be reviewed by the courts of appeals pursuant to Rule 52(a), like the facts in other civil bench-tried litigation in federal courts.

The Court of Appeals in this case proposed to "apply a *de novo* standard of review to the application of the exemption to the facts and [to] review the facts under a clearly erroneous standard." 774 F. 2d, at 352, citing *United States* v. *McConney*, 728 F. 2d 1195, 1202 (CA9) (en banc), cert. denied, 469 U. S. 824 (1984). But nowhere in its opinion did the court ever mention any of the factual findings of the District Court, much less discuss or analyze them. The Court of Appeals seems to have believed that the District Court applied the wrong legal standard for what constitutes a "seaman" under § 213(b)(6). Whereas the District Court concluded that respondents were seamen because they performed work of a maritime character on navigable waters, see App. A–3 to Pet. for Cert. 6, the Court of Appeals held that under the pertinent regulations, the critical factor for determining whether an employee on a vessel is a seaman is whether his "duties primarily aid navigation of the vessel." 774 F. 2d, at 353; see also 29 CFR §§ 783.31, 783.33, 783.36 (1985). The Court of Appeals reviewed the record independently and found that the "dominant employment" of the respondents was "industrial maintenance," and that the "maritime work" that the respondents performed took but a small portion of their work time. 774 F. 2d, at 353. It therefore concluded that respondents were industrial maintenance employees and not seamen. *Ibid.*

We think that the Court of Appeals was mistaken to engage in such factfinding. The District Court found that "each of the [respondents] . . . performed work which was maritime in character and rendered while the *ARCTIC STAR* was in navigable waters." App. A–3 to Pet. for Cert. 6. But it made no finding that the "maritime work" was "incidental and occasional, taking but a small portion of the work time." 774 F. 2d, at 353. The question of how the respondents spent their working time on board the *Arctic Star* is a question of fact. The question whether their particular activities excluded them from the overtime benefits of the FLSA is a question of law which both parties concede is governed by the pertinent regulations promulgated by the Wage and Hour Administrator. See 29 CFR pt. 783 (1985). If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings. If it was of the view that the findings of the District Court were "clearly erroneous" within the meaning of Rule 52(a), it could have set them aside on that basis. If it believed that the District Court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the District Court's judgment. But it should not simply have made factual findings on its own. As we stated in *Anderson* v. *Bessemer City*, 470 U. S. 564, 574–575 (1985):

> "The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources."

The judgment of the Court of Appeals is accordingly vacated, and the cause is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, dissenting.

The Court chastises the Court of Appeals for supplying a gap in the District Court's factual findings with uncontested facts rather than "remand[ing] to the District Court to make those findings." *Ante,* at 714. The criticism is unwarranted.

The issue in this case is whether respondents, who are maintenance employees on a nonself-propelled seafood processing barge, qualify as seamen under the Fair Labor Standards Act and are therefore not entitled to overtime benefits under that Act. See 29 U. S. C. § 207(a)(1). The only dispute below was with regard to the proper definition of "seaman"—an issue on which certiorari was denied and one on which the Court ventures no opinion. The District Court "found that the [respondents] performed work of a maritime character on navigable waters" and "concluded that the [respondents] were 'seamen' and exempt from the overtime provision of the FLSA under 29 U. S. C. § 213(b)(6)." 774 F. 2d 349, 351 (CA9 1985). The Court of Appeals reversed because "[o]ne does not become a 'seaman' under the FLSA merely by performing services aboard a vessel on navigable waters." *Id.*, at 353. Under a proper understanding of the statute, it held that respondents were not seamen:

> "These facts are undisputed. . . .
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> . . . . .
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> "The record indicates, and Icicle's counsel conceded at oral argument, that the [processing barge] remained anchored most of the time. During these periods, the [respondents] primarily monitored, maintained and repaired the processing machinery and electric power generators. Although some of their work may have been of a maritime character, the dominant employment was

> industrial maintenance. The maritime work was incidental and occasional, taking but a small portion of the work time.
>
> "We conclude that these employees, while working on a barge anchored in navigable waters, are principally employed not as exempt seamen but as industrial maintenance employees." *Id.*, at 352–353.

The Court's only quarrel with the Court of Appeals is that it "made factual findings on its own" on the issue whether "the 'maritime work' was 'incidental and occasional, taking but a small portion of the work time.'" *Ante*, at 714. Apparently, the Court would have preferred to see the case "remanded to the District Court," *ibid.*, for the purely ministerial act of entry of formal findings on "these . . . undisputed" facts. The "rationale for deference to the original finder of fact," *Anderson* v. *Bessemer City*, 470 U. S. 564, 574 (1985), embodied in Rule 52(a) does not compel the entirely unrelated proposition that only district courts may make such findings. Appellate courts in general and this Court in particular have, after correcting an erroneous interpretation of law, applied the proper legal standard to undisputed facts of record—whether or not such facts have been memorialized in formal findings by "the original finder of fact." This practice not only promotes "the just, speedy, and inexpensive determination" of civil actions which Rule 52(a) is intended to secure, Fed. Rule Civ. Proc. 1, but it also allows appellate courts to give guidance to trial courts by illustrating the proper application of a new legal standard in a particular case.

I would affirm the judgment of the Court of Appeals.

EVANS, GOVERNOR OF IDAHO, ET AL. *v.* JEFF D. ET AL., MINORS, BY AND THROUGH THEIR NEXT FRIEND, JOHNSON, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84-1288. Argued November 13, 1985—Decided April 21, 1986

The Civil Rights Attorney's Fees Awards Act of 1976 (Fees Act) provides that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee" in enumerated civil rights actions. Respondents brought a class action against petitioners (the Governor and other public officials of Idaho responsible for the education and treatment of mentally handicapped children) in Federal District Court on behalf of children who have been or will be placed in petitioners' care. It was alleged that deficiencies in both the educational programs and health care services provided respondents violated the Federal and State Constitutions and various federal and state statutes. Injunctive relief and an award of costs and attorney's fees were sought. Ultimately, the District Court approved a settlement granting the injunctive relief sought conditional on respondents' waiver of any claim for attorney's fees. The Court of Appeals invalidated the fee waiver, left standing the remainder of the settlement, and remanded to the District Court to determine what attorney's fees were reasonable, holding that the historical background of Federal Rule of Civil Procedure 23(e), which gives a district court power to approve settlements of class actions, and of the Fees Act, compelled the conclusion that a stipulated waiver of attorney's fees obtained solely as a condition for obtaining relief for the class should not be accepted by the court.

Held:

1. The District Court had the power, in its discretion, to approve the waiver of attorney's fees. Pp. 730–738.

(a) The language of the Fees Act, as well as its legislative history, indicates that Congress bestowed on the "prevailing *party*" a statutory eligibility for a discretionary award of attorney's fees in specified civil rights actions. Neither the statute nor the legislative history suggests that Congress intended to forbid *all* waivers of attorney's fees. Congress neither bestowed fee awards upon attorneys nor rendered them nonwaivable or nonnegotiable; instead, it added them to the remedies available to combat civil rights violations, a goal not invariably inconsistent with conditioning settlement on the merits on a waiver of statutory attorney's fees. Pp. 730–732.

(b) A general proscription against waiver of attorney's fees in exchange for a settlement on the merits would itself impede vindication of civil rights, at least in some cases, by reducing the attractiveness of settlement. It is not implausible to anticipate that parties to a significant number of civil rights cases would refuse to settle if liability for attorney's fees remained open, thereby forcing more cases to trial, unnecessarily burdening the judicial system, and disserving civil rights litigants. Pp. 732–738.

2. The District Court did not abuse its discretion in approving a waiver of attorney's fees that secured broad injunctive relief greater than that which respondents could reasonably have expected to achieve at trial. There is nothing in the record to indicate that Idaho has adopted a statute, policy, or practice insisting on a fee waiver as a condition of settlement in civil rights litigation in conflict with the Fees Act. Nor does the record indicate that petitioners' request to waive fees was a vindictive effort to deter attorneys from representing plaintiffs in civil rights suits against Idaho. Pp. 738–743.

743 F. 2d 648, reversed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 743.

James Thomas Jones, Attorney General of Idaho, argued the cause for petitioners. With him on the briefs were *John J. McMahon*, Chief Deputy Attorney General, and *Michael De Angelo* and *James Wickham*, Deputy Attorneys General.

Deputy Solicitor General Wallace argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Acting Solicitor General Fried*, *Acting Assistant Attorney General Willard*, *Deputy Solicitor General Geller*, *Kathryn A. Oberly*, *John F. Cordes*, and *Douglas Letter*.

William T. Coleman, Jr., argued the cause for respondents. With him on the brief were *Aaron S. Bayer*, *Howard A. Belodoff*, and *Charles Johnson III*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Alabama et al. by *Francis X. Bellotti*, Attorney General of Massachusetts,

JUSTICE STEVENS delivered the opinion of the Court.

The Civil Rights Attorney's Fees Awards Act of 1976 (Fees Act) provides that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee" in

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and *Ellen Janos* and *Carl Valvo*, Assistant Attorneys General, *Charles A. Graddick*, Attorney General of Alabama, *Harold Brown*, Attorney General of Alaska, *Robert K. Corbin*, Attorney General of Arizona, and *Anthony Ching*, Solicitor General, *John Steven Clark*, Attorney General of Arkansas, *John Van de Kamp*, Attorney General of California, *Duane Woodard*, Attorney General of Colorado, *Charles M. Oberly*, Attorney General of Delaware, *Jim Smith*, Attorney General of Florida, *Michael J. Bowers*, Attorney General of Georgia, *Richard G. Opper*, Attorney General of Guam, *Corinne Watanabe*, Acting Attorney General of Hawaii, *Linley E. Pearson*, Attorney General of Indiana, *Thomas J. Miller*, Attorney General of Iowa, *Robert T. Stephan*, Attorney General of Kansas, *David L. Armstrong*, Attorney General of Kentucky, *William J. Guste, Jr.*, Attorney General of Louisiana, *James E. Tierney*, Attorney General of Maine, *Stephen H. Sachs*, Attorney General of Maryland, *Frank J. Kelley*, Attorney General of Michigan, *Hubert H. Humphrey III*, Attorney General of Minnesota, *Edwin Lloyd Pittman*, Attorney General of Mississippi, *William L. Webster*, Attorney General of Missouri, *Mike Greely*, Attorney General of Montana, *Brian McKay*, Attorney General of Nevada, *Stephen E. Merrill*, Attorney General of New Hampshire, *Irwin I. Kimmelman*, Attorney General of New Jersey, *Lacy H. Thornburg*, Attorney General of North Carolina, *Nicholas Spaeth*, Attorney General of North Dakota, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *Michael Turpen*, Attorney General of Oklahoma, *David Frohnmayer*, Attorney General of Oregon, *Leroy S. Zimmerman*, Attorney General of Pennsylvania, *Hector Rivera-Cruz*, Attorney General of Puerto Rico, *Arlene Violet*, Attorney General of Rhode Island, *Travis Medlock*, Attorney General of South Carolina, *Mark V. Meierhenry*, Attorney General of South Dakota, *W. J. Michael Cody*, Attorney General of Tennessee, *Jim Mattox*, Attorney General of Texas, *David L. Wilkinson*, Attorney General of Utah, *Jeffrey Amestoy*, Attorney General of Vermont, *William J. Broaddus*, Attorney General of Virginia, *Victor G. Schneider*, Acting Attorney General of the Virgin Islands, *Kenneth O. Eikenberry*, Attorney General of Washington, *Charlie Brown*, Attorney General of West Virginia, *Bronson C. La Follette*, Attorney General of Wisconsin, and *A. G. McClintock*, Attorney General of Wyoming; for the City of New York by *Frederick A. O. Schwarz, Jr.*, *Leonard Koerner*, and *Paul T. Rephen;* for the Council of State Governments et al. by *Benna Ruth Solomon* and *J. Phillip Jordan;*

enumerated civil rights actions. 90 Stat. 2641, 42 U. S. C. § 1988. In *Maher* v. *Gagne*, 448 U. S. 122 (1980), we held that fees *may* be assessed against state officials after a case has been settled by the entry of a consent decree. In this case, we consider the question whether attorney's fees *must* be assessed when the case has been settled by a consent decree granting prospective relief to the plaintiff class but providing that the defendants shall not pay any part of the prevailing party's fees or costs. We hold that the District Court has the power, in its sound discretion, to refuse to award fees.

I

The petitioners are the Governor and other public officials of the State of Idaho responsible for the education and treatment of children who suffer from emotional and mental handicaps. Respondents are a class of such children who have been or will be placed in petitioners' care.[1]

On August 4, 1980, respondents commenced this action by filing a complaint against petitioners in the United States District Court for the District of Idaho. The factual allegations in the complaint described deficiencies in both the educational programs and the health care services provided respondents. These deficiencies allegedly violated the United States Constitution, the Idaho Constitution, four

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and for the Equal Employment Advisory Council by *Robert E. Williams*, *Douglas S. McDowell*, and *Thomas R. Bagby*.

Briefs of *amici curiae* urging affirmance were filed for the Committee on Legal Assistance of the Association of the Bar of the City of New York by *Allan L. Gropper;* and for the NAACP Legal Defense and Educational Fund, Inc., et al. by *Julius LeVonne Chambers*, *Charles Stephen Ralston*, *Steven L. Winter*, *E. Richard Larson*, *Burt Neuborne*, *James Robertson*, *Harold R. Tyler, Jr.*, *Norman Redlich*, *William L. Robinson*, *Norman J. Chachkin*, *Kalman Finkel*, *Helaine M. Barnett*, and *John E. Kirklin*.

[1] The number of children in petitioners' custody, as well as the duration of that custody, fluctuates to a certain degree. Although it appears that only 40 or 50 children are in custody at any one moment, the membership in respondents' class is apparently well over 2,000. App. 61.

federal statutes, and certain provisions of the Idaho Code. The complaint prayed for injunctive relief and for an award of costs and attorney's fees, but it did not seek damages.

On the day the complaint was filed, the District Court entered two orders, one granting the respondents leave to proceed *in forma pauperis*, and a second appointing Charles Johnson as their next friend for the sole purpose of instituting and prosecuting the action. At that time Johnson was employed by the Idaho Legal Aid Society, Inc., a private, nonprofit corporation that provides free legal services to qualified low-income persons.[2] Because the Idaho Legal Aid Society is prohibited from representing clients who are capable of paying their own fees,[3] it made no agreement requiring any of the respondents to pay for the costs of litigation or the legal services it provided through Johnson. Moreover, the special character of both the class and its attorney-client relationship with Johnson explains why it did not enter into any agreement covering the various contingencies that might arise during the course of settlement negotiations of a class action of this kind.

Shortly after petitioners filed their answer, and before substantial work had been done on the case, the parties entered into settlement negotiations. They were able to reach agreement concerning that part of the complaint relating to educational services with relative ease and, on October 14, 1981, entered into a stipulation disposing of that part of the case. The stipulation provided that each party would bear its "own attorney's fees and costs thus far incurred." App.

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[2] Although Johnson subsequently entered private practice and apparently bore some of the financial burden of the litigation himself, any award of costs or fees would inure to the benefit of Idaho Legal Aid. Brief for Plaintiffs in Support of Motion for Consideration of Costs and Attorney Fees in *Jeff D.* v. *Evans*, No. 80-4091 (D. Idaho), p. 6.

[3] Idaho Legal Aid receives grants under the Legal Services Corporation Act, 42 U. S. C. §§ 2996-2996*l*, and is not allowed to represent clients who are capable of paying their own legal fees, see § 2996f(b)(1); 45 CFR § 1609 (1984).

54. The District Court promptly entered an order approving the partial settlement.

Negotiations concerning the treatment claims broke down, however, and the parties filed cross-motions for summary judgment. Although the District Court dismissed several of respondents' claims, it held that the federal constitutional claims raised genuine issues of fact to be resolved at trial. Thereafter, the parties stipulated to the entry of a class certification order, engaged in discovery, and otherwise prepared to try the case in the spring of 1983.

In March 1983, one week before trial, petitioners presented respondents with a new settlement proposal. As respondents themselves characterize it, the proposal "offered virtually all of the injunctive relief [they] had sought in their complaint." Brief for Respondents 5. See App. 89. The Court of Appeals agreed with this characterization, and further noted that the proposed relief was "more than the district court in earlier hearings had indicated it was willing to grant." 743 F. 2d 648, 650 (CA9 1984). As was true of the earlier partial settlement, however, petitioners' offer included a provision for a waiver by respondents of any claim to fees or costs.[4] Originally, this waiver was unacceptable to the Idaho Legal Aid Society, which had instructed Johnson to reject any settlement offer conditioned upon a waiver of fees, but Johnson ultimately determined that his ethical obligation to his clients mandated acceptance of the proposal. The parties conditioned the waiver on approval by the District Court.[5]

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[4] Petitioners append to their brief on the merits the parties' correspondence setting forth their respective positions on settlement. Without embarking on a letter-by-letter discussion of the status of the fee waiver in the bargaining, it is clear that petitioners' proposals uniformly included fee waivers while respondents' almost always did not.

[5] Paragraph 25 of the settlement agreement provides:

"Plaintiffs and defendants shall each bear their own costs and attorney's fees thus far incurred, if so approved by the Court." App. 104.

After the stipulation was signed, Johnson filed a written motion requesting the District Court to approve the settlement "except for the provision on costs and attorney's fees," and to allow respondents to present a bill of costs and fees for consideration by the court. App. 87. At the oral argument on that motion, Johnson contended that petitioners' offer had exploited his ethical duty to his clients—that he was "forced," by an offer giving his clients "the best result [they] could have gotten in this court or any other court," to waive his attorney's fees.[6] The District Court, however, evaluated the waiver in the context of the entire settlement and rejected the ethical underpinnings of Johnson's argument. Explaining that although petitioners were "not willing to concede that they were obligated to [make the changes in their practices required by the stipulation], . . . they were willing to do them as long as their costs were outlined and they didn't face additional costs," it concluded that "it doesn't violate any ethical considerations for an attorney to give up his attorney fees in the interest of getting a better bargain for his client[s]." *Id.*, at 93. Accordingly, the District Court ap-

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In addition, the entire settlement agreement was conditioned on the District Court's approval of the waiver provision under Federal Rule of Civil Procedure 23(e). See nn. 7 and 8, *infra*.

[6] Johnson's oral presentation to the District Court reads in full as follows:

"In other words, an attorney like myself can be put in the position of either negotiating for his client or negotiating for his attorney's fees, and I think that that is pretty much the situation that occurred in this instance.

"I was forced, because of what I perceived to be a result favorable to the plaintiff class, a result that I didn't want to see jeopardized by a trial or by any other possible problems that might have occurred. And the result is the best result I could have gotten in this court or any other court and it is really a fair and just result in any instance and what should have occurred years earlier and which in fact should have been the case all along. That result I didn't want to see disturbed on the basis that my attorney's fees would cause a problem and cause that result to be jeopardized." App. 90–91.

proved the settlement and denied the motion to submit a costs bill.

When respondents appealed from the order denying attorney's fees and costs, petitioners filed a motion requesting the District Court to suspend or stay their obligation to comply with the substantive terms of the settlement. Because the District Court regarded the fee waiver as a material term of the complete settlement, it granted the motion.[7] The Court of Appeals, however, granted two emergency motions for stays requiring enforcement of the substantive terms of the consent decree pending the appeal. More dramatically, after ordering preliminary relief, it invalidated the fee waiver and left standing the remainder of the settlement; it then instructed the District Court to "make its own determination of the fees that are reasonable" and remanded for that limited purpose. 743 F. 2d, at 652.

In explaining its holding, the Court of Appeals emphasized that Rule 23(e) of the Federal Rules of Civil Procedure gives the court the power to approve the terms of all settlements of class actions,[8] and that the strong federal policy embodied in the Fees Act normally requires an award of fees to prevailing plaintiffs in civil rights actions, including those who have prevailed through settlement.[9] The court added that "[w]hen attorney's fees are negotiated as part of a class action settlement, a conflict frequently exists between the class lawyers' interest in compensation and the class members' interest in relief." 743 F. 2d, at 651–652. "To avoid this conflict," the Court of Appeals relied on Circuit precedent which had "disapproved simultaneous negotiation of settlements and attorney's fees" absent a showing of "unusual circumstances." *Id.*, at 652.[10] In this case, the Court of Appeals found no such "unusual circumstances" and therefore held that an agreement on fees "should not have been a part of the settlement of the claims of the class." *Ibid.* It concluded:

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[7] The District Court wrote a letter to respondents' counsel explaining the conditional nature of petitioners' settlement offer:

"[T]he defendants' signing of the stipulation was dependent upon the Court's approval of the finding that it was appropriate to accept a stipulation where plaintiffs waived attorneys fees. . . . The defendants entered into the stipulation only as a compromise matter with the understanding that they would not pay any attorneys fees, and advised the Court that if there were going to be attorneys fees that they wanted to proceed with trial because they did not think they were required to conform to the stipulation legally. Under those circumstances, it would be entirely inappropriate to leave the stipulation in effect. If you effectively challenge the stipulation, the whole stipulation falls and the matter must be tried by the Court. On the other hand, if you do not successfully challenge the stipulation, then the stipulation and stay is in effect. But until the validity of the stipulation is determined, the Court feels it is entirely unfair to enforce it." *Id.*, at 115–116. See *id.*, at 112.

[8] "Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed

> "The historical background of both Rule 23 and section 1988, as well as our experience since their enactment, compel the conclusion that a stipulated waiver of all attorney's fees obtained solely as a condition for obtaining relief for the class should not be accepted by the court." *Ibid.*

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dismissal or compromise shall be given to all members of the class in such manner as the court directs." Fed. Rule Civ. Proc. 23(e).

[9] As we held in *Maher* v. *Gagne*, 448 U. S. 122, 129 (1980): "The fact that respondent prevailed through a settlement rather than through litigation does not weaken her claim to fees." See *ibid.* (quoting S. Rep. No. 94–1011, p. 5 (1976)). Nor does the fact that the fee award would benefit a legal services corporation justify a refusal to make an award. See *New York Gaslight Club, Inc.* v. *Carey*, 447 U. S. 54, 70–71, n. 9 (1980); H. R. Rep. No. 94–1558, pp. 5 and 8, n. 16 (1976).

[10] That precedent, *Mendoza* v. *United States*, 623 F. 2d 1338 (CA9 1980), like the Third Circuit decision in *Prandini* v. *National Tea Co.*, 557 F. 2d 1015 (1977), which both the *Mendoza* court and the panel below cited approvingly, instituted a ban on simultaneous negotiations of merits and attorney's fees issues to prevent attorneys from trading relief benefiting the class for a more generous fee for themselves. See *Mendoza* v. *United States, supra*, at 1352–1353; *Prandini* v. *National Tea Co.*, 557 F. 2d, at 1020–1021. In neither of those cases had the court rejected a part of the settlement and enforced the remainder.

The importance of the question decided by the Court of Appeals, together with the conflict between its decision and the decisions of other Courts of Appeals,[11] led us to grant certiorari. 471 U. S. 1098 (1985). We now reverse.

II

The disagreement between the parties and *amici* as to what exactly is at issue in this case makes it appropriate to put certain aspects of the case to one side in order to state precisely the question that the case does present.

To begin with, the Court of Appeals' decision rested on an erroneous view of the District Court's power to approve settlements in class actions. Rule 23(e) wisely requires court approval of the terms of any settlement of a class action, but the power to approve or reject a settlement negotiated by the parties before trial does not authorize the court to require the parties to accept a settlement to which they have not agreed. Although changed circumstances may justify a court-ordered modification of a consent decree over the objections of a party after the decree has been entered,[12] and the District Court might have advised petitioners and respondents that it would not approve their proposal unless one or more of its provisions was deleted or modified, Rule 23(e) does not give the court the power, in advance of trial, to modify a proposed consent decree and order its acceptance over either party's objection.[13] The options available to the District Court were essentially the same as those available to respondents: it could have accepted the proposed settlement; it could have rejected the proposal and postponed the trial to see if a different settlement could be achieved; or it could have decided to try the case. The District Court could not enforce the settlement on the merits and award attorney's fees anymore than it could, in a situation in which the attorney had negotiated a large fee at the expense of the plaintiff class, preserve the fee award and order greater relief on the merits. The question we must decide, therefore, is whether the District Court had a duty to reject the proposed settlement because it included a waiver of statutorily authorized attorney's fees.

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[11] On the question whether it is ever proper to put plaintiff's counsel to the choice of recommending acceptance of a favorable settlement or pursuing a statutory fee award, the decision of the Ninth Circuit below is in accord with the rule prevailing in the Third Circuit, see *Prandini* v. *National Tea Co.*, 557 F. 2d, at 1021 (not recognizing an exception for "unusual circumstances"); cf. *El Club Del Barrio, Inc.* v. *United Community Corps.*, 735 F. 2d 98, 101, n. 3 (CA3 1984) (dictum noting applicability of *Prandini* to fee waivers in holding that such waivers must be explicit), and conflicts with decisions in four other Circuits holding that civil rights plaintiffs are free to waive fee awards as part of an overall settlement, at least in some circumstances, see *Moore* v. *National Assn. of Security Dealers, Inc.*, 246 U. S. App. D. C. 114, 125, 762 F. 2d 1093, 1104 (1985) (opinion of MacKinnon, J.); *id.*, at 134–135, 762 F. 2d, at 1113–1114 (Wald, J., concurring in judgment); *Lazar* v. *Pierce*, 757 F. 2d 435, 438–439 (CA1 1985); *Gram* v. *Bank of Louisiana*, 691 F. 2d 728, 730 (CA5 1982) (dictum); *Chicano Police Officer's Assn.* v. *Stover*, 624 F. 2d 127, 132 (CA10 1980).

[12] See *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424, 437 (1976); *United States* v. *United Shoe Machinery Corp.*, 391 U. S. 244,

That duty, whether it takes the form of a general prophylactic rule or arises out of the special circumstances of this case, derives ultimately from the Fees Act rather than from the strictures of professional ethics. Although respondents contend that Johnson, as counsel for the class, was faced with an "ethical dilemma" when petitioners offered him relief greater than that which he could reasonably have expected to obtain for his clients at trial (if only he would stipulate to a waiver of the statutory fee award), and although we recognize Johnson's conflicting interests between pursuing relief for the class and a fee for the Idaho Legal Aid Society, we do

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251 (1968); *Railway Employees* v. *Wright*, 364 U. S. 642, 651 (1961); *United States* v. *Swift & Co.*, 286 U. S. 106, 114 (1932).

[13] Cf. *Firefighters* v. *Stotts*, 467 U. S. 561, 592 (1984) (STEVENS, J., concurring in judgment); Restatement (Second) of Contracts § 184, Comment *a*, p. 30 (1981) ("If the performance as to which the agreement is unenforceable [as against public policy] is an essential part of the agreed exchange, . . . the entire agreement [is] unenforceable"); E. Farnsworth, Contracts § 5.8, p. 361 (1982).

not believe that the "dilemma" was an "ethical" one in the sense that Johnson had to choose between conflicting duties under the prevailing norms of professional conduct. Plainly, Johnson had no *ethical* obligation to seek a statutory fee award. His ethical duty was to serve his clients loyally and competently.[14] Since the proposal to settle the merits was more favorable than the probable outcome of the trial, Johnson's decision to recommend acceptance was consistent with the highest standards of our profession. The District Court, therefore, correctly concluded that approval of the settlement involved no breach of ethics in this case.

The defect, if any, in the negotiated fee waiver must be traced not to the rules of ethics but to the Fees Act.[15] Following this tack, respondents argue that the statute must be construed to forbid a fee waiver that is the product of "coercion." They submit that a "coercive waiver" results when the defendant in a civil rights action (1) offers a settlement on the merits of equal or greater value than that which plaintiffs could reasonably expect to achieve at trial but (2) conditions the offer on a waiver of plaintiffs' statutory eligibility for attorney's fees. Such an offer, they claim, exploits the ethical obligation of plaintiffs' counsel to recommend settlement in order to avoid defendant's statutory liability for its opponents' fees and costs.[16]

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[14] Generally speaking, a lawyer is under an ethical obligation to exercise independent professional judgment on behalf of his client; he must not allow his own interests, financial or otherwise, to influence his professional advice. ABA, Model Code of Professional Responsibility EC 5–1, 5–2 (as amended 1980); ABA, Model Rules of Professional Conduct 1.7(b), 2.1 (as amended 1984). Accordingly, it is argued that an attorney is required to evaluate a settlement offer on the basis of his client's interest, without considering his own interest in obtaining a fee; upon recommending settlement, he must abide by the client's decision whether or not to accept the offer, see Model Code of Professional Responsibility EC 7–7 to EC 7–9; Model Rules of Professional Conduct 1.2(a).

[15] Even state bar opinions holding it unethical for defendants to request fee waivers in exchange for relief on the merits of plaintiffs' claims are bottomed ultimately on § 1988. See District of Columbia Bar Legal Ethics Committee, Op. No. 147, reprinted in 113 Daily Wash. L. Rep. 389, 394–395 (1985); Committee on Professional and Judicial Ethics of the New York City Bar Association, Op. No. 82–80, p. 1 (1985); *id.*, at 4–5 (dissenting opinion); Committee on Professional and Judicial Ethics of the New York City Bar Association, Op. No. 80–94, reprinted in 36 Record of N. Y. C. B. A. 507, 508–511 (1981); Grievance Commission of Board of Overseers of the Bar of Maine, Op. No. 17, reprinted in Advisory Opinions of the Grievance Commission of the Board of Overseers of the Bar 69–70 (1983). For the sake of completeness, it should be mentioned that the bar is not of one mind on this ethical judgment. See Final Subcommittee Report of the Committee on Attorney's Fees of the Judicial Conference of the United State Court of Appeals for the District of Columbia Circuit, reprinted in 13

The question this case presents, then, is whether the Fees Act requires a district court to disapprove a stipulation seeking to settle a civil rights class action under Rule 23 when the offered relief equals or exceeds the probable outcome at trial but is expressly conditioned on waiver of statutory eligibility for attorney's fees. For reasons set out below, we are not persuaded that Congress has commanded that all such settlements must be rejected by the District Court. Moreover, on the facts of record in this case, we are satisfied that the Dis-

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Bar Rep. 4, 6 (1984) (declining to adopt flat rule forbidding waivers of statutory fees). Cf. State Bar of Georgia, Op. No. 39, reprinted in 10 Ga. St. Bar News No. 2, p. 5 (1984) (rejecting the reasoning of the Committee on Professional and Judicial Ethics of the New York City Bar Association in the context of lump-sum settlement offers for the reason, among others, that "[t]o force a defendant into proposing a settlement offer wherein plaintiffs['] statutory attorney fees are not negotiated . . . [means that] meaningful settlement proposals might never be made. Such a situation undeniably . . . is inimical to the resolution of disputes between parties").

[16] See Committee on Professional and Judicial Ethics of the New York City Bar Association, Op. No. 80-94, reprinted in 36 Record of N. Y. C. B. A., at 508 ("Defense counsel thus are in a uniquely favorable position when they condition settlement on the waiver of the statutory fee: they make a demand for a benefit which the plaintiff's lawyer cannot resist as a matter of ethics and which the plaintiff will not resist due to lack of interest"). Accord, District of Columbia Bar Legal Ethics Committee, Op. No. 147, reprinted in 113 Daily Wash. L. Rep., at 394.

trict Court did not abuse its discretion by approving the fee waiver.

III

The text of the Fees Act provides no support for the proposition that Congress intended to ban all fee waivers offered in connection with substantial relief on the merits.[17] On the contrary, the language of the Act, as well as its legislative history, indicates that Congress bestowed on the "prevailing *party*" (generally plaintiffs[18]) a statutory eligibility for a discretionary award of attorney's fees in specified civil rights actions.[19] It did not prevent the party from waiving this eligibility anymore than it legislated against assignment of this right to an attorney, such as effectively occurred here. Instead, Congress enacted the fee-shifting provision as "an integral part of the remedies necessary to obtain" compliance with civil rights laws, S. Rep. No. 94–1011, p. 5 (1976), to further the same general purpose—promotion of respect for civil rights—that led it to provide damages and injunctive relief. The statute and its legislative history nowhere suggest that Congress intended to forbid *all* waivers of attorney's fees—even those insisted upon by a civil rights plaintiff in exchange for some other relief to which he is indisputably not entitled[20]—anymore than it intended to bar a concession on damages to secure broader injunctive relief. Thus, while it is undoubtedly true that Congress expected fee shifting to attract competent counsel to represent citizens deprived of their civil rights,[21] it neither bestowed fee awards upon attor-

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[17] The operative language of the Fees Act provides, in its entirety:

"In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 90 Stat. 2641, 42 U. S. C. § 1988.

[18] See H. R. Rep. No. 94-1558, pp. 6-7 (1976); S. Rep. No. 94-1011, pp. 4-5, and n. 4 (1976); 122 Cong. Rec. 35122-35123 (1976) (remarks of Rep. Drinan); *id.*, at 35125 (remarks of Rep. Kastenmeier).

[19] This straightforward reading of § 1988 accords with the view held by the majority of the Courts of Appeals. See, *e. g., Jonas* v. *Stack*, 758 F. 2d 567, 570, n. 7 (CA11 1985) ("Strict conformity to the language of [§ 1988] would require that the [fee] application be made by the attorney in the name of his client, the prevailing party. We consider this to be the procedure of choice, since it ensures that awards made under the Act compensate their intended beneficiaries"); *Brown* v. *General Motors Corp.*, 722 F. 2d 1009, 1011 (CA2 1983) ("Under [42 U. S. C. § 1988] it is the prevailing party rather than the lawyer who is entitled to attorney's fees"); *Cooper* v. *Singer*, 719 F. 2d 1496, 1506-1507 (CA10 1983) (distinguishing between client's and counsel's entitlement to fees in the course of holding that "if the *client's* section 1988 fee award . . . is less than the amount owed to the attorney under the contingent fee agreement, then the lawyer will be expected to reduce his fee to the amount awarded by the courts" (emphasis added)); *White* v. *New Hampshire Dept. of Employment Security*, 629 F. 2d 697, 703 (CA1 1980) ("[A]ward of attorney's fees goes to 'prevailing party,' rather than attorney"), rev'd on other grounds, 455 U. S. 445

(1982). But cf. *James* v. *Home Construction Co. of Mobil Inc.*, 689 F. 2d 1357, 1358–1359 (CA11 1982) (disagreeing with *Smith* v. *South Side Loan Co.*, 567 F. 2d 306, 307 (CA5 1978) ("[A]n award [of attorney's fees] is the right of the party suing not the attorney representing him"), and construing Truth in Lending Act's mandatory award of attorney's fees as "creat[ing] a right of action for attorneys to seek fee awards after settlement of the plaintiff's claim." 689 F. 2d, at 1359).

[20] Judge Wald has described the use of attorney's fees as a "bargaining chip" useful to plaintiffs as well as defendants. In her opinion concurring in the judgment in *Moore* v. *National Assn. of Security Dealers, Inc.*, she wrote:

"On the other hand, the *Jeff D.* approach probably means that a defendant who is willing to grant immediate prospective relief to a plaintiff case, but would rather gamble on the outcome at trial than pay attorneys' fees and costs up front, will never settle. In short, removing attorneys' fees as a 'bargaining chip' cuts both ways. It prevents defendants, who in Title VII cases are likely to have greater economic power than plaintiffs, from exploiting that power in a particularly objectionable way; but it also deprives plaintiffs of the use of that chip, even when without it settlement may be impossible and the prospect of winning at trial may be very doubtful." 246 U. S. App. D. C., at 133, 762 F. 2d, at 1112.

[21] See H. R. Rep. No. 94–1558, *supra*, at 1, 9; S. Rep. No. 94–1011, *supra*, at 2, 6; 122 Cong. Rec. 33313–33314 (1976) (remarks of Sen. Tun-

neys nor rendered them nonwaivable or nonnegotiable; instead, it added them to the arsenal of remedies available to combat violations of civil rights, a goal not invariably inconsistent with conditioning settlement on the merits on a waiver of statutory attorney's fees.[22]

In fact, we believe that a general proscription against negotiated waiver of attorney's fees in exchange for a settlement on the merits would itself impede vindication of civil rights, at least in some cases, by reducing the attractiveness of settlement. Of particular relevance in this regard is our recent decision in *Marek* v. *Chesny*, 473 U. S. 1 (1985). In that case, which admittedly was not a class action and therefore did not implicate the court's approval power under Rule 23(e), we specifically considered and rejected the contention that civil rights actions should be treated differently from other civil actions for purposes of settlement. As THE CHIEF JUSTICE explained in his opinion for the Court, the settlement of litigation provides benefits for civil rights plain-

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ney); *id.*, at 33314–33315 (remarks of Sen. Kennedy); *id.*, at 35128 (remarks of Rep. Seiberling).

[22] Indeed, Congress specifically rejected a mandatory fee-shifting provision, see H. R. Rep. No. 94–1558, *supra*, at 3, 5, 8; 122 Cong. Rec. 35123 (1976) (remarks of Rep. Drinan), a proposal which the dissent would virtually reinstate under the guise of carrying out the legislative will. Even proponents of nonwaivable fee awards under § 1988 concede that "one would have to strain principles of statutory interpretation to conclude that Congress intended to utilize fee non-negotiability to achieve the purposes of section 1988." Calhoun, Attorney-Client Conflicts of Interest and the Concept of Non-Negotiable Fee Awards under 42 U. S. C. § 1988, 55 U. Colo. L. Rev. 341, 385 (1984). This conclusion is buttressed by Congress' decision to emulate the "over fifty" fee-shifting provisions that had been successful in enlisting the aid of "private attorneys general" in the prosecution of other federal statutes that had been on the books for decades. H. R. Rep. No. 94–1558, *supra*, at 3, 5. Accord, S. Rep. No. 94–1011, *supra*, at 3. See also 122 Cong. Rec., *supra*, at 35123 (appendix to remarks of Rep. Drinan) (listing more than 50 fee-shifting statutes). No one has suggested that the purpose of any of those fee-shifting provisions has been frustrated by the absence of a prohibition against fee waivers.

tiffs as well as defendants and is consistent with the purposes of the Fees Act:

> "There is no evidence, however, that Congress, in considering § 1988, had any thought that civil rights claims were to be on any different footing from other civil claims insofar as settlement is concerned. Indeed, Congress made clear its concern that civil rights plaintiffs not be penalized for 'helping to lessen docket congestion' by settling their cases out of court. See H. R. Rep. No. 94–1558, *supra*, at 7.
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> ". . . Some plaintiffs will receive compensation in settlement where, on trial, they might not have recovered, or would have recovered less than what was offered. And, even for those who would prevail at trial, settlement will provide them with compensation at an earlier date without the burdens, stress, and time of litigation. In short, settlements rather than litigation will serve the interests of plaintiffs as well as defendants." 473 U. S., at 10.

To promote both settlement and civil rights, we implicitly acknowledged in *Marek* v. *Chesny* the possibility of a tradeoff between merits relief and attorney's fees when we upheld the defendant's lump-sum offer to settle the entire civil rights action, including any liability for fees and costs.

In approving the package offer in *Marek* v. *Chesny* we recognized that a rule prohibiting the comprehensive negotiation of all outstanding issues in a pending case might well preclude the settlement of a substantial number of cases:

> "If defendants are not allowed to make lump-sum offers that would, if accepted, represent their total liability, they would understandably be reluctant to make settlement offers. As the Court of Appeals observed, 'many a defendant would be unwilling to make a binding settlement offer on terms that left it exposed to liability for attorney's fees in whatever amount the court might

> fix on motion of the plaintiff.' 720 F. 2d, at 477." *Id.*, at 6–7.

See *White* v. *New Hampshire Dept. of Employment Security*, 455 U. S. 445, 454, n. 15 (1982) ("In considering whether to enter a negotiated settlement, a defendant may have good reason to demand to know his total liability from both damages and fees").

Most defendants are unlikely to settle unless the cost of the predicted judgment, discounted by its probability, plus the transaction costs of further litigation, are greater than the cost of the settlement package. If fee waivers cannot be negotiated, the settlement package must either contain an attorney's fee component of potentially large and typically uncertain magnitude, or else the parties must agree to have the fee fixed by the court. Although either of these alternatives may well be acceptable in many cases, there surely is a significant number in which neither alternative will be as satisfactory as a decision to try the entire case.[23]

The adverse impact of removing attorney's fees and costs from bargaining might be tolerable if the uncertainty introduced into settlement negotiations were small. But it is not. The defendants' potential liability for fees in this kind of litigation can be as significant as, and sometimes even more significant than, their potential liability on the merits. This proposition is most dramatically illustrated by the fee awards of district courts in actions seeking only monetary relief.[24] Although it is more difficult to compare fee awards with the cost of injunctive relief, in part because the cost of such relief is seldom reported in written opinions, here too attorney's fees awarded by district courts have "frequently outrun the economic benefits ultimately obtained by successful litigants." 122 Cong. Rec. 31472 (1976) (remarks of Sen. Kennedy).[25] Indeed, in this very case "[c]ounsel for defendants view[ed] the risk of an attorney's fees award as the most significant liability in the case." Brief for Defendants in Support of Approval of Compromise in *Jeff D.* v. *Evans*, No. 80–4091 (D. Idaho), p. 5. Undoubtedly there are many other civil rights actions in which potential liability for attorney's fees may overshadow the potential cost of relief on the merits and darken prospects for settlement if fees cannot be negotiated.

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[23] It is unrealistic to assume that the defendant's offer on the merits would be unchanged by redaction of the provision waiving fees. If it were, the defendant's incentive to settle would be diminished because of the risk that attorney's fees, when added to the original merits offer, will exceed the discounted value of the expected judgment plus litigation costs. If, as is more likely, the defendant lowered the value of its offer on the merits to provide a cushion against the possibility of a large fee award, the defendant's offer on the merits will in many cases be less than the amount to which the plaintiff feels himself entitled, thereby inclining him to reject the settlement. Of course, to the extent that the merits offer is somewhere between these two extremes the incentive of both sides to settle is dampened, albeit to a lesser degree with respect to each party.

The unpredictability of attorney's fees may be just as important as their magnitude when a defendant is striving to fix its liability. Unlike a determination of costs, which ordinarily involve smaller outlays and are more susceptible of calculation, see *Marek* v. *Chesny*, 473 U. S., at 7, "[t]here is no precise rule or formula" for determining attorney's fees,

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[24] See, *e. g.*, *Rivera* v. *Riverside*, 763 F. 2d 1580, 1581–1583 (CA9 1985) (city ordered to pay victorious civil rights plaintiffs $245,456.25 following a trial in which they recovered a total of $33,350 in damages), cert. granted, 474 U. S. 917 (1985); *Cunningham* v. *City of McKeesport*, 753 F. 2d 262, 269 (CA3 1985) (city ordered to pay some $35,000 in attorney's fees in a case in which judgment for the plaintiff was entered in the amount of $17,000); *Copeland* v. *Marshall*, 205 U. S. App. D. C. 390, 401, 641 F. 2d 880, 891 (1980) (en banc) ($160,000 attorney's fees awarded for obtaining $33,000 judgment); *Skoda* v. *Fontani*, 646 F. 2d 1193, 1194 (CA7), on remand, 519 F. Supp. 309, 310 (ND Ill. 1981) ($6,086.12 attorney's fees awarded to obtain $1 recovery). Cf. *Marek* v. *Chesny*, 473 U. S., at 7 ($171,692.47 in claimed attorney's fees and costs to obtain $60,000 damages judgment).

[25] See, *e. g.*, *Grendel's Den, Inc.* v. *Larkin*, 749 F. 2d 945, 960 (CA1 1984) (awarding $113,640.85 in fees and expenses for successful challenge to law zoning liquor establishments in *Larkin* v. *Grendel's Den*, 459 U. S. 116 (1982)).

Hensley v. *Eckerhart*, 461 U. S. 424, 436 (1983).[26] Among other considerations, the district court must determine what hours were reasonably expended on what claims, whether that expenditure was reasonable in light of the success obtained, see *id.*, at 436, 440, and what is an appropriate hourly rate for the services rendered. Some District Courts have also considered whether a "multiplier" or other adjustment is appropriate. The consequence of this succession of necessarily judgmental decisions for the ultimate fee award is inescapable: a defendant's liability for his opponent's attorney's fees in a civil rights action cannot be fixed with a sufficient degree of confidence to make defendants indifferent to their exclusion from negotiation.[27] It is therefore not implausible to anticipate that parties to a significant number of civil rights cases will refuse to settle if liability for attorney's fees remains open,[28] thereby forcing more cases to trial, unnecessarily burdening the judicial system, and disserving civil rights litigants. Respondents' own waiver of attorney's fees and costs to obtain settlement of their educational claims is eloquent testimony to the utility of fee waivers in vindicating civil rights claims.[29] We conclude, therefore, that it is not

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[26] While this Court has identified "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate" as "[t]he most useful starting point for determining the amount of a reasonable fee," *Hensley* v. *Eckerhart*, 461 U. S., at 433, the "product of reasonable hours times a reasonable rate does not end the inquiry," *id.*, at 434, for "there may be circumstances in which the basic standard of reasonable rates multiplied by reasonably expended hours results in a fee that is either unreasonably low or unreasonably high." *Blum* v. *Stenson*, 465 U. S. 886, 897 (1984). "A district court is expressly empowered to exercise discretion in determining whether an award is to be made and if so its reasonableness." *Id.*, at 902, n. 19. See *Hensley* v. *Eckerhart*, 461 U. S., at 437. The district court's calculation is thus anything but an arithmetical exercise.

[27] The variability in fee awards is discussed in, for example, Berger, Court Awarded Attorneys' Fees: What is "Reasonable"?, 126 U. Pa. L. Rev. 281, 283–284 (1977); Diamond, The Firestorm over Attorney Fee Awards, 69 A. B. A. J. 1420, 1420 (1983); and National Association of Attorneys General, Report to Congress: Civil Rights Attorney's Fees Awards Act of 1976 (Feb. 3, 1984), reprinted in Hearing on The Legal Fee Equity Act (S. 2802) before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 98th Cong., 2d Sess., 280–293 (1984).

[28] This is the experience of every judge and a majority of the members of a Third Circuit Task Force which concluded that that Circuit's ban on fee negotiations "tends to discourage settlement in some cases and, on occa-

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sion, makes it impossible." Report of the Third Circuit Task Force: Court Awarded Fees 38 (1985) (footnotes omitted). The Task Force reasoned:

"[P]reventing agreement on fees at the time settlement of the merits is discussed . . . makes it difficult for the defendant to ascertain precisely what its liability will be, thereby eliminating the very certainty that makes settlement attractive to the defendant. The net effect . . . may be more trials, thus raising the question whether that cost is justifiable inasmuch as the conflict between settling the merits and discussing fees may be more hypothetical than real." *Ibid.* (footnotes omitted).

[29] Respondents implicitly acknowledge a defendant's need to fix his total liability when they suggest that the parties to a civil rights action should "exchange information" regarding plaintiff's attorney's fees. See, *e. g.*, Committee on Professional and Judicial Ethics of the New York City Bar Association, Op. No. 82–80, p. 2 (1985); Grievance Commission of Board of Overseers of the Bar of Maine, Op. No. 17, Advisory Opinions of the Grievance Commission of the Board of Overseers of the Bar 70 (1983). If this exchange is confined to time records and customary billing rates, the information provides an insufficient basis for forecasting the fee award for the reasons stated above. If the "exchange" is more in the nature of an "assurance" that attorney's fees will not exceed a specified amount, the rule against waiving fees to obtain a favorable settlement on the merits is to that extent breached. Apparently, some parties have circumvented the rule against simultaneous negotiation in one Circuit by means of tacit agreements of this kind. See *El Club Del Barrio, Inc.* v. *United Community Corps.*, 735 F. 2d, at 101, n. 3 (defendants' counsel suggest that the Third Circuit's ban on simultaneous negotiations is "'more honored in the breach'"); A. Miller, Attorneys' Fees in Class Actions 222 (1980) ("Hence even if agreements on fees are not included in settlements, the net result might be to increase informal agreements among counsel or to encourage withholding agreements on fees from the judge until after the settlement is approved"); Comment, Settlement Offers Conditioned Upon Waiver of Attorneys' Fees: Policy, Legal, and Ethical Considerations, 131 U. Pa. L. Rev. 793, 805, n. 90 (1983) (survey of several District Judges serving in the Third Circuit finding exchanges of information being used by plaintiffs' lawyers to "voluntarily reduce the number of compensable hours claimed as an incentive for defendant to settle"). Finally, if counsel for the plain-

necessary to construe the Fees Act as embodying a general rule prohibiting settlements conditioned on the waiver of fees in order to be faithful to the purposes of that Act.[30]

IV

The question remains whether the District Court abused its discretion in this case by approving a settlement which included a complete fee waiver. As noted earlier, Rule 23(e) wisely requires court approval of the terms of any settlement

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tiffs are allowed to renege on their informal agreements, the rule against fee waivers will have been vindicated at the expense of future settlements, inasmuch as defendants will be unable to trust assurances made by plaintiffs' counsel.

[30] The Court is unanimous in concluding that the Fees Act should not be interpreted to prohibit all simultaneous negotiations of a defendant's liability on the merits and his liability for his opponent's attorney's fees. See opinion of BRENNAN, J., dissenting, *post*, at 762–763, 764–765. We agree that when the parties find such negotiations conducive to settlement, the public interest, as well as that of the parties, is served by simultaneous negotiations. Cf. *supra*, at 732–734. This reasoning applies not only to individual civil rights actions, but to civil rights class actions as well.

Although the dissent would allow simultaneous negotiations, it would require that "whatever fee the parties agree to" be "found by the court to be a 'reasonable' one under the Fees Act." *Post*, at 754. See *post*, at 753, n. 6. The dissent's proposal is imaginative, but not very practical. Of the 10,757 "other civil rights" cases filed in federal court last year—most of which were 42 U. S. C. § 1983 actions for which § 1988 authorizes an award of fees—only 111 sought class relief. See Annual Report of the Director of the Administrative Office of the United States Courts, An Analysis of the Workload of the Federal Courts for the Twelve Month Period Ended June 30, 1985 pp. 281, 555 (1985). Assuming that of the approximately 99% of these civil rights actions that are not class actions, a further 90% would settle rather than go to trial, the dissent's proposal would require district courts to evaluate the reasonableness of fee agreements in several thousand civil rights cases annually while they make that determination in slightly over 100 civil rights class actions now. Moreover, if this novel procedure really is necessary to carry out the purposes of the Fees Act, presumably it should be applied to all cases arising under federal statutes that provide for fee shifting. But see n. 22, *supra*.

of a class action. The potential conflict among members of the class—in this case, for example, the possible conflict between children primarily interested in better educational programs and those primarily interested in improved health care—fully justifies the requirement of court approval.

The Court of Appeals, respondents, and various *amici* supporting their position, however, suggest that the court's authority to pass on settlements, typically invoked to ensure fair treatment of class members, must be exercised in accordance with the Fees Act to promote the availability of attorneys in civil rights cases. Specifically, respondents assert that the State of Idaho could not pass a valid statute precluding the payment of attorney's fees in settlements of civil rights cases to which the Fees Act applies. See Brief for Respondents 24, n. 22. From this they reason that the Fees Act must equally preclude the adoption of a uniform statewide policy that serves the same end, and accordingly contend that a consistent practice of insisting on a fee waiver as a condition of settlement in civil rights litigation is in conflict with the federal statute authorizing fees for prevailing parties, including those who prevail by way of settlement.[31] Remarkably, there seems little disagreement on these points. Petitioners and the *amici* who support them never suggest that the district court is obligated to place its stamp of approval on every settlement in which the plaintiffs' attorneys have agreed to a fee waiver. The Solicitor General, for example, has suggested that a fee waiver need not be approved when the defendant had "no realistic defense on the merits," Brief for United States as *Amicus Curiae* Supporting Reversal 23, n. 9; see *id.*, at 26–27,[32] or if the waiver was part of a "vindictive effort . . . to teach counsel that they had better not bring such cases," Tr. of Oral Arg. 22.

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[31] See Committee on Professional and Judicial Ethics of the New York City Bar Association, Op. No. 80–94, reprinted in 36 Record of N. Y. C. B. A., 507, 510 (1981) ("[T]he long term effect of persistent demands for the waiver of statutory fees is to . . . undermine efforts to make counsel available to those who cannot afford it"). Accord, District of Columbia Bar Legal Ethics Committee, Op. No. 147, reprinted in 113 Daily Wash. L. Rep. 389, 394 (1985). National staff counsel for the American Civil Liberties Union estimates that requests for fee waivers are made in more than half of all civil rights cases litigated. See Winter, Fee Waiver Requests Unethical: Bar Opinion, 68 A. B. A. J. 23 (1982).

We find it unnecessary to evaluate this argument, however, because the record in this case does not indicate that Idaho has adopted such a statute, policy, or practice. Nor does the record support the narrower proposition that petitioners' request to waive fees was a vindictive effort to deter attorneys from representing plaintiffs in civil rights suits against Idaho. It is true that a fee waiver was requested and obtained as a part of the early settlement of the education claims, but we do not understand respondents to be challenging that waiver, see Tr. of Oral Arg. 31–32, and they have not offered to prove that petitioners' tactics in this case merely implemented a routine state policy designed to frustrate the objectives of the Fees Act. Our own examination of the record reveals no such policy.

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[32] In this regard, consider the following comment in the Final Subcommittee Report of the Committee on Attorney's Fees of the Judicial Conference of the United States Court of Appeals for the District of Columbia Circuit:

"Against this background, it was agreed that there were certain situations in which the refusal of defense counsel to proceed except on a package basis was improper. For instance, in a Freedom of Information Act case, where a journalist was the plaintiff and either had a reasonably good case, or had won in the district court and the government was considering appeal, it would be improper for government counsel to offer to release the documents, only if plaintiff's counsel agreed to waive all attorneys fees. That situation presents a grossly unfair choice to the plaintiff and his/her counsel, and permitting such offers to be made would seriously undermine the purpose of fee shifting provisions. Moreover, it would serve no end other than saving the government money which it would otherwise have to pay, yet any such saving is plainly at odds with the purpose for which the fee shifting statute was enacted." 13 Bar Rep., at 6.

In light of the record, respondents must—to sustain the judgment in their favor—confront the District Court's finding that the extensive structural relief they obtained constituted an adequate *quid pro quo* for their waiver of attorney's fees.[33] The Court of Appeals did not overturn this finding. Indeed, even that court did not suggest that the option of rejecting the entire settlement and requiring the parties either to try the case or to attempt to negotiate a different settlement would have served the interests of justice. Only by making the unsupported assumption that the respondent class was entitled to retain the favorable portions of the settlement while rejecting the fee waiver could the Court of Appeals conclude that the District Court had acted unwisely.

What the outcome of this settlement illustrates is that the Fees Act has given the victims of civil rights violations a powerful weapon that improves their ability to employ counsel, to obtain access to the courts, and thereafter to vindicate their rights by means of settlement or trial. For aught that appears, it was the "coercive" effect of respondents' statutory right to seek a fee award that motivated petitioners' exceptionally generous offer. Whether this weapon might be even more powerful if fee waivers were prohibited in cases like this is another question,[34] but it is in any event a question that Congress is best equipped to answer. Thus far, the Legislature has not commanded that fees be paid whenever a case is settled. Unless it issues such a command, we shall rely primarily on the sound discretion of the district courts to appraise the reasonableness of particular class-action settlements on a case-by-case basis, in the light of all the relevant circumstances.[35] In this case, the District Court did not

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[33] From the declarations of respondents' counsel in the lower courts, as well as those of the District Court and the Court of Appeals, all of which are quoted in Part I, *supra*, we understand the District Court's approval of the stipulation settling the health services claims to have rested on the determination that the provision waiving attorney's fees and costs was fair to the class—*i. e.*, the fee waiver was exchanged for injunctive relief of equivalent value.

[34] We are cognizant of the possibility that decisions by individual clients to bargain away fee awards may, in the aggregate and in the long run, diminish lawyers' expectations of statutory fees in civil rights cases. If this occurred, the pool of lawyers willing to represent plaintiffs in such cases might shrink, constricting the "effective access to the judicial process" for persons with civil rights grievances which the Fees Act was intended to provide. H. R. Rep. No. 94–1558, p. 1 (1976). That the "tyranny of small decisions" may operate in this fashion is not to say that there is any

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reason or documentation to support such a concern at the present time. Comment on this issue is therefore premature at this juncture. We believe, however, that as a practical matter the likelihood of this circumstance arising is remote. See *Moore* v. *National Assn. of Securities Dealers, Inc.*, 246 U. S. App. D. C., at 133, n. 1, 762 F. 2d, at 1112, n. 1 (Wald, J., concurring in judgment).

[35] "Each negotiation, like each litigant, is unique; reasonableness can only be determined by looking at the strength of the plaintiff's case, the stage at which the settlement is effective, the substantiality of the relief obtained on the merits, and the explanations of the parties as to why they did what they did." *Id.*, at 134, 762 F. 2d, at 1113 (Wald, J., concurring in judgment).

See also the following comment in the opinion of the Final Subcommittee Report of the Committee on Attorney's Fees of the Judicial Conference of the United States Court of Appeals for the District of Columbia Circuit:

"[T]he purpose of such settlement offers is not, in most cases, to create an attorney-client conflict, nor to punish or deter plaintiffs' attorneys from taking on fee shifting cases. Generally speaking, the reason that defendants make such offers is to limit their total exposure.

. . . . .

"The key in these situations is whether the defendant's offer is reasonable in light of all the circumstances, including the chances of success on the merits and the risk of possible exposure in damages and attorneys fees. And in making such determinations, the legitimate interest of the fee shifting provisions must be balanced against the legitimate interest of the defendant, whether a governmental agency or private party, in making an offer which will fix liability with considerable certainty. This balancing approach applies regardless of whether the issue is phrased in terms of the right of the defendant to make a lump sum settlement offer, or the right to refuse to pay fees to the plaintiff's attorney while providing some measure of relief to the client. In both situations, the inquiry is the same and can be decided only on a case by case basis, assessing the reasonableness of the defendant's conduct." 13 Bar Report, at 6.

abuse its discretion in upholding a fee waiver which secured broad injunctive relief, relief greater than that which plaintiffs could reasonably have expected to achieve at trial.[36]

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

Ultimately, enforcement of the laws is what really counts. It was with this in mind that Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988 (Act or Fees Act). Congress authorized fee shifting to improve enforcement of civil rights legislation by making it easier for victims of civil rights violations to find lawyers willing to take their cases. Because today's decision will make it more difficult for civil rights plaintiffs to obtain legal assistance, a result plainly contrary to Congress' purpose, I dissent.

I

The Court begins its analysis by emphasizing that neither the language nor the legislative history of the Fees Act supports "the proposition that Congress intended to ban all fee waivers offered in connection with substantial relief on the merits." *Ante*, at 730. I agree. There is no evidence that

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[36] Although the record in this case does not provide us with any information concerning the amount of money that had been expended on costs, it is appropriate to note that costs other than fees may also be a significant item in class-action litigation. For example, in *Moore* v. *National Assn. of Securities Dealers, Inc.*, *supra*, the class representative's liability for costs amounted to over $30,000 at the time she decided that her best interests would be served by a settlement. 246 U. S. App. D. C., at 116–117, 762 F. 2d, at 1095, 1096, and n. 2 (opinion of MacKinnon, J.). The interest in recovering costs already expended by a class representative may justify a refusal to accept a settlement including only prospective relief and, conversely, the interest in avoiding the additional expenditures associated with continuing the litigation may also justify accepting an otherwise doubtful settlement.

Congress gave the question of fee waivers any thought at all. However, the Court mistakenly assumes that this omission somehow supports the conclusion that fee waivers are permissible. On the contrary, that Congress did not specifically consider the issue of fee waivers tells us absolutely nothing about whether such waivers ought to be permitted. It is black letter law that "[i]n the absence of specific evidence of Congressional intent, it becomes necessary to resort to a broader consideration of the legislative policy behind th[e] provision . . . ." *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, 706 (1945); see also 2A C. Sands, Sutherland on Statutory Construction §§ 54.01–54.03 (4th ed. 1984). We must interpret the statute in the way that is most consistent with Congress' broader purpose; a result which is "plainly at variance with the policy of the legislation as a whole," *Ozawa* v. *United States*, 260 U. S. 178, 194 (1922), cannot be correct. *Watt* v. *Western Nuclear, Inc.*, 462 U. S. 36, 56 (1983) (statute should not be interpreted "to produce a result at odds with the purposes underlying the statute" but rather "in a way that will further Congress' overriding objective"); 2A Sands, *supra*, § 46.07; see also *United States* v. *Freeman*, 3 How. 556, 565 (1845); *Sorrells* v. *United States*, 287 U. S. 435, 446 (1932); *United States* v. *Brown*, 333 U. S. 18, 25–26 (1948); *Lynch* v. *Overholser*, 369 U. S. 705, 710 (1962); *Perry* v. *Commerce Loan Co.*, 383 U. S. 392, 399–400 (1966) (quoting *United States* v. *American Trucking Assns.*, 310 U. S. 534, 543 (1940)); *United States* v. *Campos-Serrano*, 404 U. S. 293, 298 (1971). Accordingly, the first and most important question to be asked is what Congress' purpose was in enacting the Fees Act. We must then determine whether conditional fee waivers are consistent with this purpose.

II

The Court asserts that Congress authorized fee awards "to further the same general purpose—promotion of respect for civil rights—that led it to provide damages and injunctive relief." *Ante*, at 731. The attorney's fee made available by the Act, we are told, is simply an addition to "the arsenal of remedies available to combat violations of civil rights." *Ante*, at 732.

Obviously, the Fees Act is intended to "promote respect for civil rights." Congress would hardly have authorized fee awards in civil rights cases to promote respect for the securities laws. But discourse at such a level of generality is deceptive. The question is *how* did Congress envision that awarding attorney's fees would promote respect for civil rights? Without a clear understanding of the way in which Congress intended for the Fees Act to operate, we cannot even begin responsibly to go about the task of interpreting it. In theory, Congress might have awarded attorney's fees as simply an additional form of make-whole relief, the threat of which would "promote respect for civil rights" by deterring potential civil rights violators. If this were the case, the Court's equation of attorney's fees with damages would not be wholly inaccurate. However, the legislative history of the Fees Act discloses that this is not the case. Rather, Congress provided fee awards to ensure that there would be lawyers available to plaintiffs who could not otherwise afford counsel, so that these plaintiffs could fulfill their role in the federal enforcement scheme as "private attorneys general," vindicating the public interest.[1]

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[1] This is not to deny that the threat of liability for attorney's fees contributes to compliance with civil rights laws and that this is a desirable effect. See *Hensley* v. *Eckerhart*, 461 U. S. 424, 443, n. 2 (1983) (BRENNAN, J., concurring in part and dissenting in part); see also, *Cooper* v. *Singer*, 719 F. 2d 1496, 1501 (CA10 1983); *Shadis* v. *Beal*, 685 F. 2d 824, 829 (CA3 1982); *Oldham* v. *Ehrlich*, 617 F. 2d 163, 168 (CA8 1980); *Dennis* v. *Chang*, 611 F. 2d 1302, 1306 (CA9 1980); Calhoun, Attorney-Client Conflicts of Interest and the Concept of Non-Negotiable Fee Awards Under 42 U. S. C. § 1988, 55 U. Colo. L. Rev. 341, 343 (1984); Kraus, Ethical and Legal Concerns in Compelling the Waiver of Attorney's Fees by Civil Rights Litigants in Exchange for Favorable Settlement of Cases Under the Civil Rights Attorney's Fees Awards Act of 1976, 29 Vill. L. Rev. 597, 643–644

Before the late 1960's, the concept of fee shifting in public interest litigation was virtually nonexistent. In *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400 (1968) *(per curiam)*, this Court was called upon to interpret the attorney's fee provision of Title II of the then recently enacted Civil Rights Act of 1964, 42 U. S. C. § 2000a-3(b). We held that a prevailing plaintiff should ordinarily recover fees unless special circumstances rendered such an award unjust. Noting that "[w]hen the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law," we recognized that "[a] Title II suit is thus private in form only." *Newman*, 390 U. S., at 401. If a plaintiff obtains relief, he "does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." *Id.*, at 402 (footnote omitted). We recognized further that the right to recover attorney's fees was conferred by Congress to ensure that this private public-enforcement mechanism would operate effectively:

> "If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees — not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination

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(1984). My point is simply that this effect was not what led Congress to enact the Fees Act. Significantly, the Court cites nothing from the legislative history—or anywhere else for that matter—to support its argument that, in awarding attorney's fees to prevailing parties, Congress thought it was merely adding one more remedy to the plaintiff's existing "arsenal." As the discussion which follows clearly establishes, this is because Congress viewed attorney's fees as a special kind of remedy designed to serve a specific purpose.

> to seek judicial relief under Title II." *Ibid.* (footnote omitted).

Newman interpreted the fee provision of Title II as intended to bridge the gap between the desire of an individual who has been deprived of a federal right to see that right vindicated and the financial ability of that individual to do so. More importantly, *Newman* recognized that Congress did not erect this bridge solely, or even primarily, to confer a benefit on such aggrieved individuals. Rather, Congress sought to capitalize on the happy coincidence that encouraging private actions would, in the long run, provide effective public enforcement of Title II. By ensuring that lawyers would be willing to take Title II cases, Congress made the threat of a lawsuit for violating Title II real, thereby deterring potential violators.

After *Newman,* lower courts—invoking their equitable powers to award attorney's fees—adopted a similar rationale to award fees in cases brought under civil rights statutes that did not contain express provisions for attorney's fees. See, *e. g., Stolberg* v. *Members of Board of Trustees for State Colleges of Conn.,* 474 F. 2d 485 (CA2 1973) (42 U. S. C. § 1983); *Donahue* v. *Staunton,* 471 F. 2d 475 (CA7 1972), cert. denied, 410 U. S. 955 (1973) (same); *Lee* v. *Southern Home Sites Corp.,* 444 F. 2d 143 (CA5 1971) (42 U. S. C. § 1982). See generally Derfner, One Giant Step: The Civil Rights Attorney's Fees Awards Act of 1976, 21 St. Louis U. L. J. 441, 443, and nn. 9–22 (1977) (citing cases). In May 1975, this Court in *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U. S. 240, ruled that the equitable powers of the federal courts did not authorize fee awards on the ground that a case served the public interest. Although recognizing that "Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation," the Court held that "congressional utilization of the private-attorney-general concept can in no sense be construed as a grant of authority to the

Judiciary . . . to award attorneys' fees whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award." *Id.*, at 263. Instead, the Court ruled, only Congress could authorize awarding fees as a means of encouraging private actions in the name of public policy. *Id.*, at 269–271.

In the wake of *Alyeska*, Congress acted to correct "anomalous gaps" in the availability of attorney's fees to enforce civil rights laws, S. Rep. No. 94–1011, p. 1 (1976) (hereafter S. Rep.).[2] See H. R. Rep. No. 94–1558, p. 2 (1976) (hereafter H. R. Rep.); 122 Cong. Rec. 31472 (1976) (remarks of Sen. Kennedy). Testimony at hearings on the proposed legislation disclosed that civil rights plaintiffs, "a vast majority of [whom] cannot afford legal counsel," H. R. Rep. 1, were suffering "very severe hardships because of the *Alyeska* decision," *id.*, at 2. The unavailability of fee shifting made it impossible for legal aid services, "already short of resources," to bring many lawsuits, and, without much possibility of compensation, private attorneys were refusing to take civil rights cases. *Id.*, at 3. See generally Hearings on the Effect of Legal Fees on the Adequacy of Representation before the Subcommittee on Representation of Citizen Interests of the Senate Committee on the Judiciary, 93d Cong., 1st Sess., pts. 1–4 (1973). Congress found that *Alyeska* had a "devastating" impact on civil rights litigation, and it concluded that the need for corrective legislation was "compelling." H. R. Rep. 3; see also, 122 Cong. Rec., *supra*, at 31471 (remarks of Sen. Scott), 31472 (remarks of Sen. Kennedy).

Accepting this Court's invitation, see *Alyeska*, *supra*, at 269–271, Congress passed the Fees Act in order to reestablish the *Newman* regime under which attorney's fees were awarded as a means of securing enforcement of civil rights laws by ensuring that lawyers would be willing to take civil rights cases. The legislative history manifests this purpose with monotonous clarity. For instance, the Report of the House Judiciary Committee notes "The effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens. Although some agencies of the United States have civil rights responsibilities, their authority and resources are limited." H. R. Rep. 1. The Report explains, quoting from *Newman*, that a plaintiff who obtains relief in a private lawsuit "'does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest' importance." *Id.*, at 2 (quoting 390 U. S., at 402). The Report then describes the intended scope and operation of the Fees Act, before concluding:

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[2] *Alyeska* was decided on May 12, 1975. Senator Tunney introduced S. 2278 on July 31, 1975. The bill was signed by the President and became effective on October 19, 1976.

> "The application of these standards will insure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights, while avoiding windfalls to attorneys. The effect of [the Fees Act] will be to promote the enforcement of the Federal civil rights acts, as Congress intended, and to achieve uniformity in those statutes and justice for all citizens." H. R. Rep. 9.

These same themes are prominent in the Senate Report:

> "The purpose and effect of [the Fees Act] are simple—it is designed to allow courts to provide the familiar remedy of reasonable counsel fees to prevailing parties in suits to enforce the civil rights acts which Congress has passed since 1866. . . . All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain." S. Rep. 2.

The Senate Report quotes the same language from *Newman* as the House Report, explaining that "fees are an integral part of the remedy necessary to achieve compliance with our statutory policies." *Id.*, at 3. After citing existing fee-shifting provisions, the Report sets out the Committee's finding that "[t]hese fee shifting provisions have been successful in enabling vigorous enforcement of modern civil rights legislation, while at the same time limiting the growth of the enforcement bureaucracy." *Id.*, at 4. The Report then concludes: "If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases." *Id.*, at 6.

The floor debates, which were extensive, also are replete with similar expressions; I set out but a few examples. Senator Tunney, who sponsored the original version of the Fees Act, stated to the Senate:

> "The problem of unequal access to the courts in order to vindicate congressional policies and enforce the law is not simply a problem for lawyers and courts. Encouraging adequate representation is essential if the laws of this Nation are to be enforced. Congress passes a great deal of lofty legislation promising equal rights to all.
>
> "Although some of these laws can be enforced by the Justice Department or other Federal agencies, most of the responsibility for enforcement has to rest upon private citizens, who must go to court to prove a violation of the law. . . . But without the availability of counsel fees, these rights exist only on paper. Private citizens must be given not only the rights to go to court, but also the legal resources. If the citizen does not have the resources, his day in court is denied him; the congressional policy which he seeks to vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers." 122 Cong. Rec. 33313 (1976).

Senator Kennedy, who sponsored the amended version of the Fees Act that was actually passed, made the same point somewhat more succinctly:

> "Long experience has demonstrated . . . that Government enforcement alone cannot accomplish [compliance with the civil rights laws]. Private enforcement of these laws by those most directly affected must continue to receive full congressional support. Fee shifting provides a mechanism which can give full effect to our civil rights laws, at no added cost to the Government." *Id.*, at 31472.

But perhaps it was Representative Anderson, responding to a question from an opponent of the Fees Act, who summed up the reason for the legislation most effectively. He said:

> "We are talking here about major civil rights laws. We have an obligation, it seems to me, as the representatives of the people, to make sure that those laws are enforced and we discharge that obligation when we make available a reasonable award of attorneys' fees at the discretion of the court. Those of us who are interested in making sure that those laws are enforced . . . are simply abetting and aiding that process of law enforcement when we agree to the provisions of this bill." *Id.*, at 35116.

See also, *e. g., id.*, at 31471 (remarks of Sen. Scott) ("Congress should encourage citizens to go to court in private suits to vindicate its policies and protect their rights"), 35128 (remarks of Rep. Seiberling).

III

As this review of the legislative history makes clear, then, by awarding attorney's fees Congress sought to attract competent counsel to represent victims of civil rights violations.[3] Congress' primary purpose was to enable "private attorneys general" to protect the public interest by creating economic incentives for lawyers to represent them. The Court's assertion that the Fees Act was intended to do nothing more than give individual victims of civil rights violations another remedy is thus at odds with the whole thrust of the legislation. Congress determined that the public as a whole has an interest in the vindication of the rights conferred by the civil rights statutes over and above the value of a civil rights remedy to a particular plaintiff.[4]

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[3] Even the Court acknowledges that "it is undoubtedly true that Congress expected fee shifting to attract competent counsel to represent citizens deprived of their civil rights . . . ." *Ante*, at 731 (footnote omitted). Ironically, the only authority the Court cites from the legislative history is in support of this statement.

I have gone to great lengths to show how the Court mischaracterizes the purpose of the Fees Act because the Court's error leads it to ask the wrong question. Having concluded that the Fees Act merely creates another remedy to vindicate the rights of individual plaintiffs, the Court asks whether negotiated waivers of statutory attorney's fees are "invariably inconsistent" with the availability of such fees as a remedy for individual plaintiffs. *Ante*, at 732. Not surprisingly, the Court has little difficulty knocking down this frail straw man.[5] But the *proper* question is whether permitting negotiated fee waivers is consistent with Congress' goal of attracting competent counsel. It is therefore necessary to consider the effect on *this* goal of allowing individual plaintiffs to negotiate fee waivers.

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[4] The Court seems to view the options as limited to two: either the Fees Act confers a benefit on attorneys, a conclusion which is contrary to both the language and the legislative history of the Act, *ante*, at 730–731; or the Fees Act confers a benefit on individual plaintiffs, who may freely exploit the statutory fee award to their own best advantage. It apparently has not occurred to the Court that Congress might have made a remedy available to individual plaintiffs primarily for the benefit of the *public*. However, Congress often takes advantage of individual incentives to advance public policy, relying upon "private attorneys general" to secure enforcement of public rights without the need to establish an independent enforcement bureaucracy. As long as the interests of individual plaintiffs coincide with those of the public, it does not matter whether Congress intended primarily to benefit the individual or primarily to benefit the public. However, when individual and public interests diverge, as they may in particular situations, we must interpret the legislation so as not to frustrate Congress' intentions. See *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, 704 (1945).

[5] The assumption that fee awards are identical to other remedies like damages or injunctive relief makes it easy for the Court to conclude that

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Permitting plaintiffs to negotiate fee waivers in exchange for relief on the merits actually raises two related but distinct questions. First, is it permissible under the Fees Act to negotiate a settlement of attorney's fees simultaneously with the merits? Second, can the "reasonable attorney's fee" guaranteed in the Act be waived? As a matter of logic, either of these practices may be permitted without also permitting the other. For instance, one could require bifurcated settlement negotiations of merits and fees but allow plaintiffs to waive their fee claims during that phase of the negotiations. Alternatively, one could permit simultaneous negotiation of fees and merits but prohibit the plaintiff from waiving statutory fees. This latter possibility exists because there is a *range* of "reasonable attorney's fees" consistent with the Fees Act in any given case. Cf. *Blum* v. *Stenson*, 465 U. S. 886 (1984); *Hensley* v. *Eckerhart*, 461 U. S. 424, 433–437 (1983); H. R. Rep. 8–9; S. Rep. 6; see generally *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714, 716–720 (CA5 1974) (listing relevant factors).[6]

More importantly, since simultaneous negotiation and waiver may have different effects on the congressional policy of encouraging counsel to accept civil rights cases, each practice must be analyzed independently to determine whether or

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Congress would not have intended to prohibit fee waivers in exchange for relief on the merits "anymore than it intended to bar a concession on damages to secure broader injunctive relief." *Ante*, at 731.

[6] Thus, even if statutory fees cannot be waived, the parties may still want to agree on a fee (or a range of acceptable fees) that they believe to be within the range of fees authorized by the Act. The parties may then, if they choose to do so, make their settlement on the merits contingent upon the district court's approval of their negotiated fee as within the range of "reasonable" fees contemplated by the Fees Act.

not it is consistent with the Fees Act. Unfortunately, the Court overlooks the logical independence of simultaneous negotiation and waiver and assumes that there cannot be one without the other. See *ante*, at 734–738, and n. 28. As a result, the Court's discussion conflates the different effects of these practices, and its opinion is of little use in coming to a fair resolution of this case. An independent examination leads me to conclude: (1) that plaintiffs should not be permitted to waive the "reasonable fee" provided by the Fees Act; but (2) that parties may undertake to negotiate their fee claims simultaneously with the merits so long as whatever fee the parties agree to is found by the court to be a "reasonable" one under the Fees Act.

B

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It seems obvious that allowing defendants in civil rights cases to condition settlement of the merits on a waiver of statutory attorney's fees will diminish lawyers' expectations of receiving fees and decrease the willingness of lawyers to accept civil rights cases. Even the Court acknowledges "the possibility that decisions by individual clients to bargain away fee awards may, in the aggregate and in the long run, diminish lawyers' expectations of statutory fees in civil rights cases." *Ante*, at 741–742, n. 34. The Court tells us, however, that "[c]omment on this issue" is "premature at this juncture" because there is not yet supporting "documentation." *Ibid.* The Court then goes on anyway to observe that "as a practical matter the likelihood of this circumstance arising is remote." *Ibid.*

I must say that I find the Court's assertions somewhat difficult to understand. To be sure, the impact of conditional fee waivers on the availability of attorneys will be less severe than was the restriction on fee awards created in *Alyeska*. However, that experience surely provides an indication of the immediate hardship suffered by civil rights claimants whenever there is a reduction in the availability of attorney's fee awards.[7] Moreover, numerous courts and commentators have recognized that permitting fee waivers creates disincentives for lawyers to take civil rights cases and thus makes it more difficult for civil rights plaintiffs to obtain legal assistance. See, *e. g., Moore* v. *National Assn. of Securities Dealers, Inc.*, 246 U. S. App. D. C. 114, 133–134, 762 F. 2d 1093, 1112–1113 (Wald, J., concurring in judgment) *id.*, at 138, 762 F. 2d, at 1117 (Wright, J., dissenting) (1985); *Shadis* v. *Beal*, 685 F. 2d 824, 830–831 (CA3), cert. denied *sub nom. O'Bannon* v. *Shadis*, 459 U. S. 970 (1982); Kraus, 29 Vill. L. Rev., at 625, 633–638; Comment, Settlement Offers Conditioned Upon Waiver of Attorneys' Fees: Policy, Legal, and Ethical Considerations, 131 U. Pa. L. Rev. 793, 814–816 (1983); Committee on Professional and Judicial Ethics of the New York City Bar Association, Op. No. 80–94, reprinted in 36 Record of N. Y. C. B. A. 507, 508–509 (1981).

But it does not require a sociological study to see that permitting fee waivers will make it more difficult for civil rights plaintiffs to obtain legal assistance. It requires only common sense. Assume that a civil rights defendant makes a settlement offer that includes a demand for waiver of statutory attorney's fees. The decision whether to accept or reject the offer is the plaintiff's alone, and the lawyer must abide by the plaintiff's decision. See, *e. g.*, ABA, Model Rules of Professional Conduct 1.2(a) (1984); ABA, Model Code of Professional Responsibility EC 7–7 to EC 7–9 (1982).[8] As a formal matter, of course, the statutory fee belongs to the plaintiff, *ante*, at 730, and n. 19, and thus technically the decision to waive entails a sacrifice only by the plaintiff. As a practical matter, however, waiver affects only the lawyer. Because "a vast majority of the victims of civil rights violations" have no resources to pay attorney's fees, H. R. Rep. 1,[9] lawyers cannot hope to recover fees from the plaintiff and must depend entirely on the Fees Act for compensation.[10] The plaintiff thus has no real stake in the statutory fee and is unaffected by its waiver. See *Lipscomb* v. *Wise*, 643 F. 2d 319, 320 (CA5 1981) *(per curiam)*. Consequently, plaintiffs will readily agree to waive fees if this will help them to obtain other relief they desire.[11] As summed up by the Legal Ethics Committee of the District of Columbia Bar:

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[7] It is especially important to keep in mind the fragile nature of the civil rights bar. Even when attorney's fees are awarded, they do not approach the large sums which can be earned in ordinary commercial litigation. See Berger, Court Awarded Attorneys' Fees: What is "Reasonable"?, 126 U. Pa. L. Rev. 281, 310–315 (1977). It is therefore cost inefficient for private practitioners to devote much time to civil rights cases. Consequently, there are very few civil rights practitioners, and most of these devote only a small part of their time to such cases. Kraus, 29 Vill. L. Rev., at 633–634 (citing studies indicating that less than 1% of lawyers engage in public interest practice). Instead, civil rights plaintiffs must depend largely on legal aid organizations for assistance. These organizations, however, are short of resources and also depend heavily on statutory fees. H. R. Rep. 3; Kraus, *supra*, at 634; see also, *Blum* v. *Stenson*, 465 U. S. 886, 894–895 (1984).

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[8] The attorney is, in fact, obliged to advise the plaintiff whether to accept or reject the settlement offer based on his independent professional judgment, and the lawyer's duty of undivided loyalty requires that he render such advice free from the influence of his or his organization's interest in a fee. See, *e. g.*, ABA, Model Code of Professional Responsibility EC 5–1, EC 5–2, DR 5–101(A) (1982); ABA, Model Rules of Professional Conduct 1.7(b), 2.1 (1984). Thus, counsel must advise a client to accept an offer which includes waiver of the plaintiff's right to recover attorney's fees if, on the whole, the offer is an advantageous one. See, *e. g.*, Commission Op. No. 17 (1981), Advisory Opinions of the Grievance Commission of the Board of Overseers of the Bar of Maine 69, 70 (1983); District of Columbia Bar, Legal Ethics Committee, Op. No. 147, reprinted in 113 Daily Washington Law Reporter 389, 394 (1985). As the discussion in text makes clear, the plaintiff makes no sacrifice by waiving statutory attorney's fees, and thus a settlement offer is not made less attractive by the inclusion of a demand for a fee waiver.

[9] See also S. Rep. 2; 122 Cong. Rec. 31472 (1976) (remarks of Sen. Kennedy); *id.*, at 31832 (remarks of Sen. Hathaway) ("[R]ight now the vindication of important congressional policies in the vital area of civil rights is made to depend upon the financial resources of those least able to promote them"). Indeed, legal aid organizations receiving funds under the Legal Services Corporation Act, 42 U. S. C. §§ 2996–2996*l*, are prohibited from representing individuals who are capable of paying their own legal fees. See § 2996f(b)(1); 45 CFR § 1609 (1985).

[10] Nor can attorneys protect themselves by requiring plaintiffs to sign contingency agreements or retainers at the outset of the representation. *Amici* legal aid societies inform us that they are prohibited by statute, court rule, or Internal Revenue Service regulation from entering into fee

> "Defense counsel . . . are in a uniquely favorable position when they condition settlement on the waiver of the statutory fee: They make a demand for a benefit that the plaintiff's lawyer cannot resist as a matter of ethics and one in which the plaintiff has no interest and therefore will not resist." Op. No. 147, reprinted in 113 Daily Washington Reporter, *supra* n. 8, at 394.

Of course, from the lawyer's standpoint, things could scarcely have turned out worse. He or she invested consid-

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agreements with their clients. Brief for NAACP Legal Defense and Educational Fund, Inc., et al. as *Amici Curiae* 10–11; Brief for Committee on Legal Assistance of the Association of the Bar of the City of New York as *Amicus Curiae* 12–13. Moreover, even if such agreements could be negotiated, the possibility of obtaining protection through contingency fee arrangements is unavailable in the very large proportion of civil rights cases which, like this case, seek only injunctive relief. In addition, the Court's misconceived doctrine of state sovereign immunity, see *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 247 (1985) (BRENNAN, J., dissenting), precludes damages suits against governmental bodies, the most frequent civil rights defendants. Finally, even when a suit is for damages, many civil rights actions concern amounts that are too small to provide real compensation through a contingency fee arrangement. Of course, none of the parties has seriously suggested that civil rights attorneys can protect themselves through private arrangements. After all, Congress enacted the Fees Act because, after *Alyeska*, it found such arrangements wholly inadequate. *Supra*, at 748–751.

[11] This result is virtually inevitable in class actions where, even if the class representative feels sympathy for the lawyer's plight, the obligation to represent the interests of absent class members precludes altruistic sacrifice. In class actions on behalf of incompetents, like this one, it is the lawyer himself who must agree to sacrifice his own interests for those of the class he represents. See, *e. g.*, ABA, Model Code of Professional Responsibility EC 7–12 (1982).

erable time and effort in the case, won, and has exactly nothing to show for it. Is the Court really serious in suggesting that it takes a study to prove that this lawyer will be reluctant when, the following week, another civil rights plaintiff enters his office and asks for representation? Does it truly require that somebody conduct a test to see that legal aid services, having invested scarce resources on a case, will feel the pinch when they do not recover a statutory fee?

And, of course, once fee waivers are permitted, defendants will seek them as a matter of course, since this is a logical way to minimize liability. Indeed, defense counsel would be remiss *not* to demand that the plaintiff waive statutory attorney's fees. A lawyer who proposes to have his client pay more than is necessary to end litigation has failed to fulfill his fundamental duty zealously to represent the best interests of his client. Because waiver of fees does not affect the plaintiff, a settlement offer is not made less attractive to the plaintiff if it includes a demand that statutory fees be waived. Thus, in the future, we must expect settlement offers routinely to contain demands for waivers of statutory fees.[12]

The cumulative effect this practice will have on the civil rights bar is evident. It does not denigrate the high ideals that motivate many civil rights practitioners to recognize that lawyers are in the business of practicing law, and that, like other business people, they are and must be concerned with earning a living.[13] The conclusion that permitting fee waivers will seriously impair the ability of civil rights plaintiffs to obtain legal assistance is embarrassingly obvious.

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[12] The Solicitor General's suggestion that we can prohibit waivers sought as part of a "vindictive effort" to teach lawyers not to bring civil rights cases, Tr. of Oral Arg. 22, a point that the Court finds unnecessary to consider, *ante*, at 739–740, is thus irrelevant. Defendants will seek such waivers in every case simply as a matter of sound bargaining. Indeed, the Solicitor General's brief suggests that this will be the bargaining posture of the United States in the future. Brief for United States as *Amicus Curiae* 12–13.

[13] See Johnson, Lawyers' Choice: A Theoretical Appraisal of Litigation Investment Decisions, 15 Law & Soc. Rev. 567 (1980–1981) (concluding that "fee for service" lawyers will withdraw resources from a given case

Because making it more difficult for civil rights plaintiffs to obtain legal assistance is precisely the opposite of what Congress sought to achieve by enacting the Fees Act, fee waivers should be prohibited. We have on numerous prior occasions held that "a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy." *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S., at 704 (holding right to liquidated damages under Fair Labor Standards Act nonwaivable). See also, *e. g.*, *Boyd* v. *Grand Trunk Western R. Co.*, 338 U. S. 263, 266 (1949) (holding venue provision of Federal Employers' Liability Act nonwaivable); *Wilko* v. *Swan*, 346 U. S. 427, 434–438 (1953) (holding void an agreement to arbitrate in lieu of judicial remedy provided by Securities Exchange Act); cf. *James* v. *Home Construction Co. of Mobile, Inc.*, 689 F. 2d 1357, 1359 (CA11 1982) (implying a right of action for attorneys to seek fees under Truth-in-Lending Act to further congressional policies). This is simply straightforward application of the well-established principle that an agreement which is contrary to public policy is void and unenforceable. See Restatement (Second) of Contracts § 178 (1981); see also, *Brooklyn Savings Bank* v. *O'Neil*, *supra*, at 710; *Crites, Inc.* v. *Prudential Insurance Co.*, 322 U. S. 408, 418 (1944); *Weil* v. *Neary*, 278 U. S. 160, 171–174 (1929); *Woodstock Iron Co.* v. *Richmond & Danville Extension Co.*, 129 U. S. 643, 662–663 (1889).[14]

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when total expected costs exceed total expected benefits); Kraus, 29 Vill. L. Rev., at 637 ("No matter how sophisticated the analysis of attorney responses becomes, the conclusion remains that the more we decrease the reasonable expectation of Fees Act awards, the less likely it is that Fees Act cases will be initiated").

[14] To be sure, prohibiting fee waivers will require federal courts to make a determination they would not have to make if fees could be waived. However, this additional chore will not impose a significant burden. In

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This all seems so obvious that it is puzzling that the Court reaches a different result. The Court's rationale is that, unless fee waivers are permitted, "parties to a significant number of civil rights cases will refuse to settle . . . ." *Ante*, at 736. This is a wholly inadequate justification for the Court's result.

First, the effect of prohibiting fee waivers on settlement offers is just not an important concern in the context of the Fees Act. I agree with the Court that encouraging settlements is desirable policy. But it is *judicially* created policy, applicable to litigation of any kind and having no special force in the context of civil rights cases.[15] The *congressional* policy underlying the Fees Act is, as I have argued throughout, to create incentives for lawyers to devote time to civil rights cases by making it economically feasible for them to do so. *Supra*, at 745–753.[16] As explained above, permitting fee

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assessing the impact of making statutory fees nonwaivable on the business of the federal courts, it is important not to overlook the context in which the fee determination is made. Unlike in the adversarial context, if the parties have agreed to a fee (or a range of acceptable fees) as part of a settlement, the court will not be required to hear testimony or engage in judicial factfinding in order to resolve disputes over hours reasonably spent, hourly rates, and the like. Similarly, the court will not have to decide whether to enhance the lodestar to reflect high-quality representation or risk of nonsuccess, or to prepare an opinion in anticipation of appellate review. The court's simple task will be to review the parties' raw billing data in order to determine whether the court itself *could* reasonably have made a fee award of the amount agreed to by the parties. Such calculations will, in the vast majority of cases, require little time or effort.

[15] By lessening docket congestion, settlements make it possible for the judicial system to operate more efficiently and more fairly while affording plaintiffs an opportunity to obtain relief at an earlier time. These benefits accrue when settlements are reached in noncivil rights cases no less than in civil rights cases.

[16] Settlement is discussed only once in the legislative history of the Fees Act. The House Committee Report explained: "The phrase 'prevailing party' is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits. It would also include a liti-

waivers significantly undercuts this policy. Thus, even if prohibiting fee waivers does discourage some settlements, a *judicial* policy favoring settlement cannot possibly take precedence over this express *congressional* policy. We must implement Congress' agenda, not our own.

In an attempt to justify its decision to elevate settlement concerns, the Court argues that settlement "provides benefits for civil rights plaintiffs as well as defendants and is consistent with the purposes of the Fees Act" because "'[s]ome plaintiffs will receive compensation in settlement where, on trial, they might not have recovered, or would have recovered less than what was offered.'" *Ante,* at 732–733 (quoting *Marek* v. *Chesny,* 473 U. S. 1, 10 (1985)); see also *ante,* at 731 (legislative history does not show that Congress intended to bar "even [waivers] insisted upon by a civil rights plaintiff in exchange for some other relief to which he is indisputably not entitled . . .") (footnote omitted).

As previously noted, by framing the purpose of the Fees Act in very general terms, the Court merely obscures the proper focus of discussion. The Fees Act was designed to help civil rights plaintiffs in a particular way—by ensuring that there will be lawyers willing to represent them. The fact that fee waivers may produce some settlement offers that are beneficial to a few individual plaintiffs is hardly "consistent with the purposes of the Fees Act," *ante,* at 733, if permitting fee waivers fundamentally undermines what Congress sought to achieve. Each individual plaintiff who waives his right to statutory fees in order to obtain additional relief for himself makes it that much more difficult for the next victim of a civil rights violation to find a lawyer willing or able to bring *his* case. As obtaining legal assistance becomes more difficult, the "benefit" the Court so magnani-

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gant who succeeds even if the case is concluded prior to a full evidentiary hearing before a judge or jury. . . . A 'prevailing' party should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion." H. R. Rep. 7.

mously preserves for civil rights plaintiffs becomes available to fewer and fewer individuals, exactly the opposite result from that intended by Congress.

Moreover, I find particularly unpersuasive the Court's apparent belief that Congress enacted the Fees Act to help plaintiffs coerce relief to which they are "indisputably not entitled." See *ante*, at 731, 732. It may be that, in particular cases, some defendants' fears of incurring liability for plaintiff's attorney's fees will give plaintiffs leverage to coerce relief they do not deserve. If so, this is an unfortunate cost of a statute intended to ensure that plaintiffs can obtain the relief to which they *are* entitled. And it certainly is not a result we must preserve at the expense of the central purpose of the Fees Act.

Second, even assuming that settlement practices are relevant, the Court greatly exaggerates the effect that prohibiting fee waivers will have on defendants' willingness to make settlement offers. This is largely due to the Court's failure to distinguish the fee waiver issue from the issue of simultaneous negotiation of fees and merits claims. *Supra*, at 754. The Court's discussion mixes concerns over a defendant's reluctance to settle because total liability remains uncertain with reluctance to settle because the cost of settling is too high. See *ante*, at 734–737. However, it is a prohibition on simultaneous negotiation, not a prohibition on fee waivers, that makes it difficult for the defendant to ascertain his total liability at the time he agrees to settle the merits. Thus, while prohibiting fee waivers may deter settlement offers simply because requiring the defendant to pay a "reasonable attorney's fee" increases the total cost of settlment, this is a separate issue altogether, and the Court's numerous arguments about why defendants will not settle unless they can determine their total liability at the time of settlement, *ante*, at 734, 735, 736, are simply beside the point.[17] With respect to a prohibition on fee waivers (and again merely assuming that effects on settlement are relevant), the sole question to be asked is whether the increased cost of settlement packages will prevent enough settlement offers to be a dispositive factor in this case.

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[17] For the reasons stated in Part III–C, I would permit simultaneous negotiation of fees and merits. The parties could agree upon a reasonable

The Court asserts, without factual support,[18] that requiring defendants to pay statutory fee awards will prevent a "significant number" of settlements. *Ante*, at 734–735. It is, of course, ironic that the same absence of "documentation" which makes comment on the effects of *permitting* fee waivers "premature at this juncture," *ante*, at 742, n. 34, does not similarly affect the Court's willingness to speculate about what to expect if fee waivers are *prohibited*. Be that as it may, I believe that the Court overstates the extent to which prohibiting fee waivers will deter defendants from making settlement offers. Because the parties can negotiate a fee (or a range of fees) that is not unduly high and condition their settlement on the court's approval of this fee, the magnitude

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fee which would be subject to judicial approval under the Fees Act. Any settlement on the merits could be made contingent upon such approval. By permitting defendants to ascertain their total liability prior to settling, this approach fully alleviates the Court's concerns in this regard.

[18] The Court does cite a few cases in which courts awarded attorney's fees greater in value than the relief obtained on the merits. See *ante*, at 734–735, and nn. 24, 25. From these, the Court would have us draw the inference that without fee waivers there will be significantly fewer settlements. But what a few courts have done in the context of adversarial proceedings tells us little about what to expect when parties negotiate a reasonable fee award. A court may exercise its discretion and fix a fee award at the upper end of the range of reasonable fees while the parties may agree in negotiation to a figure in the middle or at the lower end of this range.

The Court also cites a brief filed by petitioners in the District Court which states that petitioners viewed the risk of a large attorney's fee award as "'the most significant liability in the case.'" *Ante*, at 735 (quoting Brief for Defendants in Support of Approval of Compromise in *Jeff D.* v. *Evans*, No. 80–4091 (Idaho), p. 5). This self-serving statement, filed by petitioners to persuade the District Court to approve a fee waiver, is hardly authority for the conclusion the Court seeks to establish.

of a defendant's liability for fees in the settlement context need be neither uncertain nor particularly great.[19] Against this, the defendant must weigh the risk of a nonnegotiated fee to be fixed by the court after a trial; as the Court reminds us, fee awards in *this* context may be very uncertain and, potentially, of very great magnitude. See *ante*, at 734–735, nn. 23, 24. Thus, powerful incentives remain for defendants to seek settlement. Moreover, the Court's decision last Term in *Marek* v. *Chesny*, 473 U. S. 1 (1985), provides an additional incentive for defendants to make settlement offers, namely, the opportunity to limit liability for attorney's fees if the plaintiff refuses the offer and proceeds to trial.

All of which is not to deny that prohibiting fee waivers will deter some settlements; any increase in the costs of settling will have this effect. However, by exaggerating the size and the importance of fee awards, and by ignoring the options available to the parties in settlement negotiations, the Court makes predictions that are inflated. An actual disincentive to settling exists only where three things are true: (1) the defendant feels he is likely to win if he goes to trial, in which case the plaintiff will recover no fees; (2) the plaintiff will agree to relief on the merits that is less costly to the defendant than litigating the case; and (3) adding the cost of a negotiated attorney's fee makes it less costly for the defendant to litigate. I believe that this describes a very small class of cases—although, like the Court, I cannot "document" the assertion.

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I would, on the other hand, permit simultaneous negotiation of fees and merits claims, since this would not contravene the purposes of the Fees Act. Congress determined that awarding prevailing parties a "reasonable" fee would create necessary—and sufficient—incentives for attorneys to work on civil rights cases. Prohibiting plaintiffs from waiving statutory fees ensures that lawyers will receive this "reasonable" statutory fee. Thus, if fee waivers are prohibited, permitting simultaneous fees and merits negotiations will not interfere with the Act; the lawyer will still be entitled to and will still receive a reasonable attorney's fee. Indeed, permitting simultaneous negotiations in such circumstances may even enhance the effectiveness of the Fees Act by making it easier for a lawyer to dispose of his cases more quickly. This frees up the lawyer's time to take other cases and may enhance his reputation as an effective advocate who quickly obtains relief for clients.

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[19] Indeed, although such cases should be rare, in frivolous or minor disputes an agreement that no fees be awarded could be approved by the court as "reasonable" under the Fees Act. Cf. S. Rep. 5 (prevailing plaintiff should ordinarily recover fees, but fees may be denied in "special circumstances"); *Kerr* v. *Quinn*, 692 F. 2d 875 (CA2 1982); *Skehan* v. *Board of Trustees of Bloomsburg State College*, 436 F. Supp. 657 (MD Pa. 1977).

IV

Although today's decision will undoubtedly impair the effectiveness of the private enforcement scheme Congress established for civil rights legislation, I do not believe that it will bring about the total disappearance of "private attorneys general." It is to be hoped that Congress will repair this Court's mistake. In the meantime, other avenues of relief are available. The Court's decision in no way limits the power of state and local bar associations to regulate the ethical conduct of lawyers. Indeed, several Bar Associations have already declared it unethical for defense counsel to seek fee waivers. See Committee on Professional Ethics of the Association of the Bar of the City of New York, Op. No. 82–80 (1985); District of Columbia Legal Ethics Committee, Op. No. 147, *supra* n. 8, 113 Daily Washington Law Reporter, at 389. Such efforts are to be commended and, it is to be hoped, will be followed by other state and local organizations concerned with respecting the intent of Congress and with protecting civil rights.

In addition, it may be that civil rights attorneys can obtain agreements from their clients not to waive attorney's fees.[20] Such agreements simply replicate the private market for legal services (in which attorneys are not ordinarily required to contribute to their client's recovery[21]), and thus will enable civil rights practitioners to make it economically feasible—as Congress hoped—to expend time and effort litigating civil rights claims.

During the floor debates over passage of the Fees Act, Senator Hugh Scott reminded the Congress in terms that might well have been addressed to the Court today that "we must bear in mind at all times that rights that cannot be enforced through the legal process are valueless; such a situation breeds cynicism about the basic fairness of our judicial system. [We] must be vigilant to insure that our legal rights are not hollow ones." 122 Cong. Rec. 31471 (1976).

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[20] Since Congress has not sought to regulate ethical concerns either in the Fees Act or elsewhere, the legality of such arguments is purely a matter of local law. See *Nix* v. *Whiteside*, *ante*, at 176 (BRENNAN, J., concurring in judgment).

[21] One of the more peculiar aspects of the Court's interpretation of the Fees Act is that it permits defendants to require plaintiff's counsel to contribute his compensation to satisfying the plaintiff's claims. In ordinary civil litigation, no defendant would make—or sell to his adversary—a settlement offer conditioned upon the plaintiff's convincing his attorney to contribute to the plaintiff's recovery. Yet today's decision creates a situation in which plaintiff's attorneys in civil rights cases are required to do just that. Thus, rather than treating civil rights claims no differently than other civil litigation, *ante*, at 733 (quoting *Marek* v. *Chesny*, 473 U. S. 1, 10 (1985)), the Court places such litigation in a quite unique—and unfavorable—category.

PHILADELPHIA NEWSPAPERS, INC., ET AL. *v.* HEPPS ET AL.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

No. 84–1491. Argued December 3, 1985—Decided April 21, 1986

Appellee Hepps is the principal stockholder of appellee corporation that franchises a chain of stores selling beer, soft drinks, and snacks. Appellant owner published a series of articles in its Philadelphia newspaper whose general theme was that Hepps, the franchisor corporation, and its franchisees (also appellees) had links to organized crime and used some of those links to influence the State's governmental processes. Appellees then brought a defamation suit in a Pennsylvania state court against the newspaper owner and the authors (also appellants) of the articles in question. Concluding that the Pennsylvania statute giving the defendant the burden of proving the truth of allegedly defamatory statements violated the Federal Constitution, the trial court instructed the jury that the plaintiff bore the burden of proving falsity. The jury ruled for appellants and therefore awarded no damages to appellees. The Pennsylvania Supreme Court, concluding that a showing of fault did not require a showing of falsity, held that to place the burden of showing truth on the defendant did not unconstitutionally inhibit free debate, and remanded the case for a new trial.

Held: In a case such as this one, where a newspaper publishes speech of public concern about a private figure, the private-figure plaintiff cannot recover damages without also showing that the statements at issue are false. Because in such a case the scales are in an uncertain balance as to whether the statements are true or false, the Constitution requires that the scales be tipped in favor of protecting true speech. To ensure that true speech on matters of public concern is not deterred, the common-law presumption that defamatory speech is false cannot stand. While Pennsylvania's "shield law," which allows employees of the media to refuse to divulge their sources, places a heavier burden on appellees, the precise scope of that law is unclear and, under these circumstances, it does not appear that such law requires a different constitutional standard than would prevail in the absence of such law. Pp. 771–779.

506 Pa. 304, 485 A. 2d 374, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and POWELL, JJ., joined. BRENNAN, J., filed a concurring opinion, in which BLACKMUN, J., joined, *post*, p. 779. STE-

VENS, J., filed a dissenting opinion, in which BURGER, C. J., and WHITE and REHNQUIST, JJ., joined, *post*, p. 780.

David H. Marion argued the cause for appellants. With him on the briefs were *Samuel E. Klein* and *Kerry L. Adams*.

Ronald H. Surkin argued the cause for appellees. With him on the brief was *Edwin P. Rome*.*

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us once more to "struggl[e] . . . to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 325 (1974). In *Gertz*, the Court held that a private figure who brings a suit for defamation cannot recover without some showing that the media defendant was at fault in publishing the statements at issue. *Id.*, at 347. Here, we hold that, at least where a newspaper publishes speech of public

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *John G. Koeltl, James C. Goodale, Burt Neuborne, Jack D. Novick, Stefan Presser, Bruce W. Sanford, W. Terry Maguire, R. Bruce Rich, Robert D. Sack*, and *Alice Neff Lucan;* for the American Federation of Labor and Congress of Industrial Organizations by *David M. Silberman* and *Laurence Gold;* for Capital Cities Communications, Inc., et al. by *Bernard G. Segal, Jerome J. Shestack, Carl A. Solano, Elihu A. Greenhouse*, and *Lawrence Gunnels;* and for Print and Broadcast Media et al. by *E. Barrett Prettyman, Jr., Dan Paul, Franklin G. Burt, Steven M. Kamp, John H. McElhaney, Richard M. Schmidt, Jr., Peter G. Banta, Stuart F. Pierson, Neil L. Shapiro, Wilford W. Kirton, Jr., David M. Olive, Theodore Sherbow, Robert Haydock, Jr., Peter Michael Meloy, W. Joel Blass, William W. Ogden, Eric D. Lanphere, Michael A. Gross, Conrad M. Shumadine, William A. Niese, Norton L. Armour, H. Hugh Stevens, Jr., Thomas T. Cobb, Michael Minnis, James L. Koley, J. Laurent Scharff, Alexander Wellford, Donald B. Holbrook, Edward P. Davis, Jr., P. Cameron DeVore, Gregg D. Thomas, Jack M. Weiss, Rutledge C. Clement, Jr.*, and *George K. Rahdert.*

Daniel J. Popeo filed a brief for the American Legal Foundation as *amicus curiae* urging affirmance.

concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false.

I

Maurice S. Hepps is the principal stockholder of General Programming, Inc. (GPI), a corporation that franchises a chain of stores—known at the relevant time as "Thrifty" stores—selling beer, soft drinks, and snacks. Mr. Hepps, GPI, and a number of its franchisees are the appellees here.[1] Appellant Philadelphia Newspapers, Inc., owns the Philadelphia Inquirer (Inquirer). The Inquirer published a series of articles, authored by appellants William Ecenbarger and William Lambert, containing the statements at issue here. The general theme of the five articles, which appeared in the Inquirer between May 1975 and May 1976, was that appellees had links to organized crime and used some of those links to influence the State's governmental processes, both legislative and administrative. The articles discussed a state legislator, described as "a Pittsburgh Democrat and convicted felon," App. A60, whose actions displayed "a clear pattern of interference in state government by [the legislator] on behalf of Hepps and Thrifty," *id.*, at A62–A63. The stories reported that federal "investigators have found connections between Thrifty and underworld figures," *id.*, at A65; that "the Thrifty Beverage beer chain . . . had connections . . . with organized crime," *id.*, at A80; and that Thrifty had "won a series of competitive advantages through rulings by the State Liquor Control Board," *id.*, at A65. A grand jury was said to be investigating the "alleged relationship between the Thrifty chain and known Mafia figures," and "[w]hether the chain received special treatment from the [state Governor's] administration and the Liquor Control Board." *Id.*, at A68.

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[1] Appellants list nine entities as appellees in the proceedings in this Court: Maurice S. Hepps; General Programming, Inc.; A. David Fried, Inc.; Brookhaven Beverage Distributors, Inc.; Busy Bee Beverage Co.; ALMIK, Inc.; Lackawanna Beverage Distributors; N. F. O., Inc.; and Elemar, Inc. Brief for Appellants ii.

Appellees brought suit for defamation against appellants in a Pennsylvania state court. Consistent with *Gertz, supra,* Pennsylvania requires a private figure who brings a suit for defamation to bear the burden of proving negligence or malice by the defendant in publishing the statements at issue. 42 Pa. Cons. Stat. § 8344 (1982). As to falsity, Pennsylvania follows the common law's presumption that an individual's reputation is a good one. Statements defaming that person are therefore presumptively false, although a publisher who bears the burden of proving the truth of the statements has an absolute defense. See 506 Pa. 304, 313–314, 485 A. 2d 374, 379 (1984). See also 42 Pa. Cons. Stat. § 8343(b)(1) (1982) (defendant has the burden of proving the truth of a defamatory statement). Cf. *Gertz, supra,* at 349 (common law presumes injury to reputation from publication of defamatory statements). See generally Eaton, The American Law of Defamation Through *Gertz* v. *Robert Welch, Inc.*, and Beyond: An Analytical Primer, 61 Va. L. Rev. 1349, 1352–1357 (1975) (describing common-law scheme of defamation law).

The parties first raised the issue of burden of proof as to falsity before trial, but the trial court reserved its ruling on the matter. Appellee Hepps testified at length that the statements at issue were false, Tr. 2221–2290, and he extensively cross-examined the author of the stories as to the veracity of the statements at issue. After all the evidence had been presented by both sides, the trial court concluded that Pennsylvania's statute giving the defendant the burden of proving the truth of the statements violated the Federal Constitution. *Id.*, at 3589. The trial court therefore instructed the jury that the plaintiffs bore the burden of proving falsity. *Id.*, at 3848.

During the trial, appellants took advantage of Pennsylvania's "shield law" on a number of occasions. That law allows employees of the media to refuse to divulge their sources. See 42 Pa. Cons. Stat. § 5942(a) (1982) ("No person . . . employed by any newspaper of general circulation . . . or any radio or television station, or any magazine of general circulation, . . . shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit"). See also 506 Pa., at 327, 485 A. 2d, at 387 ("This statute has been interpreted broadly"). Appellees requested an instruction stating that the jury could draw a negative inference from appellants' assertions of the shield law; appellants requested an instruction that the jury could not draw any inferences from those exercises of the shield law's privilege. The trial judge declined to give either instruction. Tr. 3806–3808. The jury ruled for appellants and therefore awarded no damages to appellees.

Pursuant to Pennsylvania statute, 42 Pa. Cons. Stat. § 722(7) (1982), the appellees here brought an appeal directly to the Pennsylvania Supreme Court. That court viewed *Gertz* as simply requiring the plaintiff to show fault in actions for defamation. It concluded that a showing of fault did not require a showing of falsity, held that to place the burden of showing truth on the defendant did not unconstitutionally inhibit free debate, and remanded the case for a new trial.[2] 506 Pa., at 318–329, 485 A. 2d, at 382–387. We noted probable jurisdiction, 472 U. S. 1025 (1985), and now reverse.

II

In *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), the Court "determin[ed] for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct." *Id.*, at 256. The State's trial court in that case believed the statements tended to injure the plaintiff's reputation or bring him into public contempt, *id.*, at 267, and were therefore libelous *per se*, *id.*, at 262. The trial court therefore instructed the jury that it could presume falsity, malice, and some damage to reputation, as long as it found that the defendant had published the statements and that the statements concerned the plaintiff. *Ibid.* The trial court also instructed the jury that an award of punitive damages required "malice" or "actual malice." *Id.*, at 262, 267. The jury found for the plaintiff and made an award of damages that did not distinguish between compensatory and punitive damages. *Id.*, at 262. The Alabama Supreme Court upheld the judgment of the trial court in all respects. *Id.*, at 263.

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[2] The state courts that have considered this issue since *Gertz* have reached differing conclusions. Compare, *e. g.*, *Denny* v. *Mertz*, 106 Wis. 2d 636, 654–658, 318 N. W. 2d 141, 150–151 (defendant must bear burden of showing truth), cert. denied, 459 U. S. 883 (1982), and *Memphis Publishing Co.* v. *Nichols*, 569 S. W. 2d 412 (Tenn. 1978) (same), with *Gazette, Inc.* v. *Harris*, 229 Va. 1, 15–16, 325 S. E. 2d 713, 725 (plaintiff must bear burden of showing falsity), cert. denied, 473 U. S. 905 (1985), and *Madison* v. *Yunker*, 180 Mont. 54, 67, 589 P. 2d 126, 133 (1978) (same).

This Court reversed, holding that "libel can claim no talismanic immunity from constitutional limitations." *Id.*, at 269. Against the "background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks," the Court noted that "[a]uthoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker." *Id.*, at 270–271. Freedoms of expression require "'breathing space,'" *id.*, at 272 (quoting *NAACP* v. *Button*, 371 U. S. 415, 433 (1963)):

> "A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to . . . 'self-censorship.' . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt

> whether it can be proved in court or fear of the expense of having to do so." 376 U. S., at 279.

The Court therefore held that the Constitution

> "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, at 279–280.

That showing must be made with "convincing clarity," *id.*, at 285–286, or, in a later formulation, by "clear and convincing proof," *Gertz*, 418 U. S., at 342. The standards of *New York Times* apply not only when a public official sues a newspaper, but also when a "public figure" sues a magazine or news service. See *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 162–165 (1967) (Warren, C. J., concurring in result); *id.*, at 170 (opinion of Black, J.); *id.*, at 172 (opinion of BRENNAN, J.). See also *Wolston* v. *Reader's Digest Assn., Inc.*, 443 U. S. 157, 163–169 (1979).

A decade after *New York Times*, the Court examined the constitutional limits on defamation suits by private-figure plaintiffs against media defendants. *Gertz, supra.* The Court concluded that the danger of self-censorship was a valid, but not the exclusive, concern in suits for defamation: "The need to avoid self-censorship by the news media is . . . , not the only societal value at issue . . . [or] this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation." *Gertz, supra,* at 341. See also *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (Stewart, J., concurring). Any analysis must also take into account the "legitimate state interest underlying the law of libel [in] the compensation of individuals for the harm inflicted on them by defamatory falsehood." *Gertz, supra,* at 341. See also *Time, Inc.* v. *Firestone*, 424 U. S. 448, 456 (1976) (discussing the "appropriate accommodation between the public's interest in an uninhibited press and its equally compelling need for judicial redress of libelous utterances"). In light of that interest, and in light of the fact that private figures have lesser access to media channels useful for counteracting false statements and have not voluntarily placed themselves in the public eye, *Gertz, supra,* at 344–345, the Court held that the Constitution "allows the States to impose liability on the publisher or broadcaster of defamatory falsehood on a less demanding showing than that required by *New York Times,*" 418 U. S., at 348: "[S]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Id.*, at 347. Nonetheless, even when private figures are involved, the constitutional requirement of fault supersedes the common law's presumptions as to fault and damages. In addition, the Court in *Gertz* expressly held that, although a showing of simple fault sufficed to allow recovery for actual damages, even a private-figure plaintiff was required to show actual malice in order to recover presumed or punitive damages. *Id.*, at 348–350.

The Court most recently considered the constitutional limits on suits for defamation in *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U. S. 749 (1985). In sharp contrast to *New York Times, Dun & Bradstreet* involved not only a private-figure plaintiff, but also speech of purely private concern. 472 U. S., at 751–752. A plurality of the Court in *Dun & Bradstreet* was convinced that, in a case with such a configuration of speech and plaintiff, the showing of actual malice needed to recover punitive damages under either *New York Times* or *Gertz* was unnecessary:

> "In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest [in preserving private reputation] adequately supports awards of presumed and punitive

> damages—even absent a showing of 'actual malice.'" 472 U. S., at 761 (opinion of POWELL, J.) (footnote omitted).

See also *id.*, at 764 (BURGER, C. J., concurring in judgment); *id.*, at 774 (WHITE, J., concurring in judgment).

One can discern in these decisions two forces that may reshape the common-law landscape to conform to the First Amendment. The first is whether the plaintiff is a public official or figure, or is instead a private figure. The second is whether the speech at issue is of public concern. When the speech is of public concern and the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law. When the speech is of public concern but the plaintiff is a private figure, as in *Gertz*, the Constitution still supplants the standards of the common law, but the constitutional requirements are, in at least some of their range, less forbidding than when the plaintiff is a public figure and the speech is of public concern. When the speech is of exclusively private concern and the plaintiff is a private figure, as in *Dun & Bradstreet*, the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape.

Our opinions to date have chiefly treated the necessary showings of fault rather than of falsity. Nonetheless, as one might expect given the language of the Court in *New York Times*, see *supra*, at 772–773, a public-figure plaintiff must show the falsity of the statements at issue in order to prevail in a suit for defamation. See *Garrison* v. *Louisiana*, 379 U. S. 64, 74 (1964) (reading *New York Times* for the proposition that "a public official [is] allowed the civil [defamation] remedy only if he establishes that the utterance was false"). See also *Herbert* v. *Lando*, 441 U. S. 153, 176 (1979) ("[T]he plaintiff must focus on the editorial process and prove a false publication attended by some degree of culpability").

Here, as in *Gertz*, the plaintiff is a private figure and the newspaper articles are of public concern. In *Gertz*, as in *New York Times*, the common-law rule was superseded by a constitutional rule. We believe that the common law's rule on falsity—that the defendant must bear the burden of proving truth—must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages.

There will always be instances when the factfinding process will be unable to resolve conclusively whether the speech is true or false; it is in those cases that the burden of proof is dispositive. Under a rule forcing the plaintiff to bear the burden of showing falsity, there will be some cases in which plaintiffs cannot meet their burden despite the fact that the speech is in fact false. The plaintiff's suit will fail despite the fact that, in some abstract sense, the suit is meritorious. Similarly, under an alternative rule placing the burden of showing truth on defendants, there would be some cases in which defendants could not bear their burden despite the fact that the speech is in fact true. Those suits would succeed despite the fact that, in some abstract sense, those suits are unmeritorious. Under either rule, then, the outcome of the suit will sometimes be at variance with the outcome that we would desire if all speech were either demonstrably true or demonstrably false.

This dilemma stems from the fact that the allocation of the burden of proof will determine liability for some speech that is true and some that is false, but *all* of such speech is *unknowably* true or false. Because the burden of proof is the deciding factor only when the evidence is ambiguous, we cannot know how much of the speech affected by the allocation of the burden of proof is true and how much is false. In a case presenting a configuration of speech and plaintiff like the one we face here, and where the scales are in such an uncertain balance, we believe that the Constitution requires us to tip them in favor of protecting true speech. To ensure that true speech on matters of public concern is not deterred, we hold that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern.

In the context of governmental restriction of speech, it has long been established that the government cannot limit speech protected by the First Amendment without bearing the burden of showing that its restriction is justified. See *Consolidated Edison Co.* v. *Public Service Comm'n of N. Y.*, 447 U. S. 530, 540 (1980) (content-based restriction); *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 786 (1978) (speaker-based restriction); *Renton* v. *Playtime Theatres, Inc.*, *ante*, at 47–54 (secondary-effects restriction). See also *Speiser* v. *Randall*, 357 U. S. 513 (1958) (striking down the precondition that a taxpayer sign a loyalty oath before receiving certain tax benefits). It is not immediately apparent from the text of the First Amendment, which by its terms applies only to governmental action, that a similar result should obtain here: a suit by a private party is obviously quite different from the government's direct enforcement of its own laws. Nonetheless, the need to encourage debate on public issues that concerned the Court in the governmental-restriction cases is of concern in a similar manner in this case involving a private suit for damages: placement by state law of the burden of proving truth upon media defendants who publish speech of public concern deters such speech because of the fear that liability will unjustifiably result. See *New York Times*, 376 U. S., at 279; *Garrison*, *supra*, at 74 ("Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned"). Because such a "chilling" effect would be antithetical to the First Amendment's protection of true speech on matters of public concern, we believe that a private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant. To do otherwise could "only result in a deterrence of speech which the Constitution makes free." *Speiser*, *supra*, at 526.

We recognize that requiring the plaintiff to show falsity will insulate from liability some speech that is false, but unprovably so. Nonetheless, the Court's previous decisions on the restrictions that the First Amendment places upon the common law of defamation firmly support our conclusion here with respect to the allocation of the burden of proof. In attempting to resolve related issues in the defamation context, the Court has affirmed that "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters." *Gertz*, 418 U. S., at 341. Here the speech concerns the legitimacy of the political process, and therefore clearly "matters." See *Dun & Bradstreet*, 472 U. S., at 758–759 (speech of public concern is at the core of the First Amendment's protections). To provide "'breathing space,'" *New York Times, supra*, at 272 (quoting *NAACP* v. *Button*, 371 U. S., at 433), for true speech on matters of public concern, the Court has been willing to insulate even *demonstrably* false speech from liability, and has imposed additional requirements of fault upon the plaintiff in a suit for defamation. See, *e. g.*, *Garrison*, 379 U. S., at 75; *Gertz, supra*, at 347. We therefore do not break new ground here in insulating speech that is not even demonstrably false.

We note that our decision adds only marginally to the burdens that the plaintiff must already bear as a result of our earlier decisions in the law of defamation. The plaintiff must show fault. A jury is obviously more likely to accept a plaintiff's contention that the defendant was at fault in publishing the statements at issue if convinced that the relevant statements were false. As a practical matter, then, evidence offered by plaintiffs on the publisher's fault in adequately investigating the truth of the published statements will generally encompass evidence of the falsity of the matters asserted. See Keeton, Defamation and Freedom of the Press, 54 Texas L. Rev. 1221, 1236 (1976). See also Franklin & Bussel, The Plaintiff's Burden in Defamation: Awareness and Falsity, 25 Wm. & Mary L. Rev. 825, 856–857 (1984).

We recognize that the plaintiff's burden in this case is weightier because of Pennsylvania's "shield" law, which allows employees of the media to refuse to divulge their sources. See *supra*, at 770–771.[3] But we do not have before us the question of the permissible reach of such laws. Indeed, we do not even know the precise reach of Pennsylvania's statute. The trial judge refused to give any instructions to the jury as to whether it could, or should, draw an inference adverse to the defendant from the defendant's decision to use the shield law rather than to present affirmative evidence of the truthfulness of some of the sources. See *supra*, at 771. That decision of the trial judge was not addressed by Pennsylvania's highest court, nor was it appealed to this Court.[4] In the situation before us, we are unconvinced that the State's shield law requires a different constitutional standard than would prevail in the absence of such a law.

For the reasons stated above, the judgment of the Pennsylvania Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE BLACKMUN joins, concurring.

I believe that where allegedly defamatory speech is of public concern, the First Amendment requires that the plaintiff, whether public official, public figure, or private individual, prove the statements at issue to be false, and thus join the Court's opinion. Cf. *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29 (1971). I write separately only to note that, while the Court reserves the question whether the rule it announces applies to nonmedia defendants, *ante*, at 779, n. 4, I adhere to my view that such a distinction is "irreconcilable with the fundamental First Amendment principle that '[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of the source, whether corporation, association, union, or individual.'" *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U. S. 749, 781 (1985) (BRENNAN, J., dissenting) (quoting *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 777 (1978)).

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[3] Pennsylvania is not alone in this choice. See, *e. g.*, Ala. Code § 12–21–142 (1977); Cal. Const., Art. I, § 2(b); N. Y. Civ. Rights Law § 79–h (McKinney 1976).

[4] We also have no occasion to consider the quantity of proof of falsity that a private-figure plaintiff must present to recover damages. Nor need we consider what standards would apply if the plaintiff sues a nonmedia defendant, see *Hutchinson* v. *Proxmire*, 443 U. S. 111, 133, n. 16 (1979), or if a State were to provide a plaintiff with the opportunity to obtain a judgment that declared the speech at issue to be false but did not give rise to liability for damages.

JUSTICE STEVENS, with whom THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE REHNQUIST join, dissenting.

The issue the Court resolves today will make a difference in only one category of cases—those in which a private individual can prove that he was libeled by a defendant who was at least negligent. For unless such a plaintiff can overcome the burden imposed by *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 347 (1974), he cannot recover regardless of how the burden of proof on the issue of truth or falsity is allocated. By definition, therefore, the only litigants—and the only publishers—who will benefit from today's decision are those who act negligently or maliciously.

The Court, after acknowledging the need to "'accommodat[e] . . . the law of defamation and the freedoms of speech and press protected by the First Amendment,'" *ante*, at 768 (quoting *Gertz* v. *Robert Welch, Inc.*, 418 U. S., at 325), decides to override "the common-law presumption" retained by several States[1] that "defamatory speech is false" because of the need "[t]o ensure that true speech on matters of public concern is not deterred." *Ante,* at 776–777. I do not agree that our precedents require a private individual to bear the risk that a defamatory statement—uttered either with a mind toward assassinating his good name or with careless indifference to that possibility—cannot be proven false. By attaching no weight to the State's interest in protecting the private individual's good name, the Court has reached a pernicious result.

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[1] See, *e. g.*, *Elliott* v. *Roach*, 409 N. E. 2d 661, 681 (Ind. App. 1980); *Trahan* v. *Ritterman*, 368 So. 2d 181, 184 (La. App. 1979); *Parsons* v. *Gulf*

The state interest in preventing and redressing injuries to reputation is obviously important. As Justice Stewart eloquently reminded us in his concurrence in *Rosenblatt* v. *Baer,* 383 U. S. 75, 92–94 (1966):

> "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.
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> . . . . .
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> ". . . The First and Fourteenth Amendments have not stripped private citizens of all means of redress for inju-

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& South American S.S. Co., 194 So. 2d 456, 460 (La. App.), cert. denied, 389 U. S. 896 (1967); *Madison* v. *Yunker,* 180 Mont. 54, 61, 589 P. 2d 126, 129–130 (1978); *Rogozinski* v. *Airstream by Angell,* 152 N. J. Super. 133, 146–147, 377 A. 2d 807, 814 (1977), modified, 164 N. J. Super. 465, 397 A. 2d 334 (1979); *Martin* v. *Griffin Television, Inc.,* 549 P. 2d 85, 87, 94 (Okla. 1976); *Corabi* v. *Curtis Publishing Co.,* 441 Pa. 432, 447–451, 468, 273 A. 2d 899, 907–909, 917 (1971); *Memphis Publishing Co.* v. *Nichols,* 569 S. W. 2d 412, 420 (Tenn. 1978); *Frank B. Hall & Co., Inc.* v. *Buck,* 678 S. W. 2d 612, 623–625 (Tex. App. 1984), cert. denied, 472 U. S. 1009 (1985); *Denny* v. *Mertz,* 106 Wis. 2d 636, 654–655, 318 N. W. 2d 141, 150, cert. denied, 459 U. S. 883 (1982).

> ries inflicted upon them by careless liars. The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem. Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored.
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> "Moreover, the preventive effect of liability for defamation serves an important public purpose. For the rights and values of private personality far transcend mere personal interests. Surely if the 1950's taught us anything, they taught us that the poisonous atmosphere of the easy lie can infect and degrade a whole society."[2]

While deliberate or inadvertent libels vilify private personages, they contribute little to the marketplace of ideas. In assaying the First Amendment side of the balance, it helps to remember that the perpetrator of the libel suffers from its failure to demonstrate the truth of its accusation only if the "private-figure" plaintiff first establishes that the publisher is at "fault," 418 U. S., at 347—*i. e.*, either that it published its libel with "actual malice" in the *New York Times* sense ("with knowledge that it was false or with reckless disregard of whether it was false or not," *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 279–280 (1964)), or that it published with that degree of careless indifference characteristic of negligence. Far from being totally in the dark about "how much of the speech affected by the allocation of the burden of proof is true and how much is false," *ante*, at 776, the antecedent fault determination makes irresistible the inference that a significant portion of this speech is beyond the constitutional pale.[3] This observation is almost tautologically true with regard to libels published with "actual malice." For that standard to be met, the publisher must come close to willfully blinding itself to the falsity of its utterance.[4] The observation is also valid, albeit to a lesser extent, with respect to defamations uttered with "fault."[5] Thus, while the public's interest in an uninhibited press is at its nadir when the publisher is at fault or worse, society's "equally compelling" need for judicial redress of libelous utterances is at its zenith. *Time, Inc.* v. *Firestone*, 424 U. S. 448, 456 (1976).

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[2] "There is no doubt about the historical fact that the interest in one's good name was considered an important interest requiring legal protection more than a thousand years ago; and that so far as Anglo-Saxon history is concerned this interest became a legally protected interest comparatively soon after the interest in bodily integrity was given legal protection." L. Eldridge, The Law of Defamation § 53, pp. 293–294 (1978).

See *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U. S. 749, 757–758 (1985) (opinion of POWELL, J.); *id.*, at 767–769 (WHITE, J., concurring in judgment); *id.*, at 793, n. 16 (BRENNAN, J., dissenting) ("[T]he individual's interest in reputation is certainly at the core of notions of human dignity"); *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 341 (1974).

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[3] "But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues. *New York Times Co.* v. *Sullivan*, 376 U. S. [254,] 270 [(1964)]. They belong to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572 (1942)." *Gertz* v. *Robert Welch, Inc.*, 418 U. S., at 340.

But cf. *New York Times Co.* v. *Sullivan*, 376 U. S., at 279, n. 19.

[4] "Our cases, however, have furnished meaningful guidance for the further definition of a reckless publication. In *New York Times, supra*, the plaintiff did not satisfy his burden because the record failed to show that the publisher was aware of the likelihood that he was circulating false information. In *Garrison* v. *State of Louisiana*, 379 U. S. 64 (1964), . . . the opinion emphasized the necessity for a showing that a false publication was made with a 'high degree of awareness of . . . probable falsity.' 379 U. S., at 74. Mr. Justice Harlan's opinion in *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 153 (1967), stated that evidence of either deliberate falsification or reckless publication 'despite the publisher's awareness of probable falsity' was essential to recovery by public officials in defamation actions. These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstates actual malice." *St. Amant* v. *Thompson*, 390 U. S. 727, 731 (1968).

See *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (Stewart, J., concurring) ("What the *New York Times* rule ultimately protects is defamatory falsehood").

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[5] It is presumably for this reason that the Court believes that its "decision adds only marginally to the burdens that the plaintiff must already bear as a result of our earlier decisions in the law of defamation." *Ante*, at 778. See *ibid.* ("As a practical matter, then, evidence offered by plaintiffs on the publisher's fault in adequately investigating the truth of the published statements will generally encompass evidence of the falsity of the matters asserted" (citations omitted)).

Although I am inclined to agree with the preceding observation, I do not agree that it supports the result reached by the Court today. That allocation of the burden of proof is inconsequential in many cases provides no answer to cases in which it is determinative. See *infra*, at 785–787. Moreover, the Court's belief, however sincere, that its decision will not significantly impair the state interest in redressing injury to reputation is not itself sufficient to justify overriding state law. See *Gertz* v. *Robert Welch, Inc.*, 418 U. S., at 349.

I note that the Court makes no claim that its decision to impose on private-figure libel plaintiffs the burden of proving falsity is necessary to prevent jury confusion. See W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 116, pp. 839–840 (5th ed. 1984) ("[T]here is no inconsistency in assuming falsity until defendant publisher proves otherwise and requiring the plaintiff to prove negligence or recklessness with respect to the truth or falsity of the imputation"). See also 506 Pa. 304, 325, n. 13, 485 A. 2d 374, 385, n. 13 (1984) ("In a rather circuitous argument, [appellants] contend that falsity is inextricably bound up with proof of fault. [Appellants] assert that to prove fault the plaintiff in fact must demonstrate the falsity of the matter. While in some instances the plaintiff may elect to establish the patent error in the material to demonstrate the lack of due care in ascertaining its truth, it does not necessarily follow that negligence of the defendant can only be shown by proving that the material is false. A plaintiff can demonstrate negligence in the manner in which the material was gathered, regardless of its truth or falsity. In such instance the presumption of falsity will prevail unless the defendant elects to establish the truth of the material and thereby insulate itself from liability. Where it is necessary to prove falsity to establish the negligence of the defendant, it is then the burden of the plaintiff to do so. . . . That proposition will not, of course, hold true in all cases. Where negligence can be established without a demonstration of the falsity of the material, there is no additional obligation upon the plaintiff to prove the falsity of the material").

To appreciate the thrust of the Court's holding, we must assume that a private-figure libel plaintiff can prove that a story about him was published with "actual malice"—that is, without the publisher caring in the slightest whether it was false or not. Indeed, in order to comprehend the full ramifications of today's decision, we should assume that the publisher knew that it would be impossible for a court to verify or discredit the story and that it was published for no other purpose than to destroy the reputation of the plaintiff. Even if the plaintiff has overwhelming proof of malice—in both the common-law sense and as the term was used in *New York Times Co.* v. *Sullivan*—the Court today seems to believe that the character assassin has a constitutional license to defame.[6]

In my opinion deliberate, malicious character assassination is not protected by the First Amendment to the United States Constitution. That Amendment does require the target of a defamatory statement to prove that his assailant was at fault, and I agree that it provides a constitutional shield for truthful statements. I simply do not understand, however, why a character assassin should be given an absolute license to defame by means of statements that can be neither verified nor disproved. The danger of deliberate defamation by reference to unprovable facts is not a merely speculative or hypothetical concern. Lack of knowledge about third parties, the loss of critical records, an uncertain recollection about events that occurred long ago, perhaps during a period of special stress, the absence of eyewitnesses—a host of factors—may make it impossible for an honorable person to disprove malicious gossip about his past conduct, his relatives, his friends, or his business associates.

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[6] This license would gain immeasurable strength if courts take up the suggestion of commentators in the Court's camp that the nonfalsifiable nature of a libel should entitle the defendant to summary judgment. See Franklin & Bussel, The Plaintiff's Burden in Defamation: Awareness and Falsity, 25 Wm. & Mary L. Rev. 825, 865 (1984) ("If the plaintiff's suit is based upon a statement that is not susceptible to being proved false, for example, the court should deny any discovery and dismiss the complaint").

The danger of which I speak can be illustrated within the confines of this very case. Appellants published a series of five articles proclaiming that "Federal authorities . . . have found connections between Thrifty and underworld figures," App. A65; that "Federal agents have evidence of direct financial involvement in Thrifty by [Joseph] Scalleat," a "leader of organized crime in northeastern Pennsylvania," *id.*, at A72; and that "the Thrifty Beverage beer chain . . . had connections itself with organized crime," *id.*, at A80.[7] The defamatory character of these statements is undisputed. Yet the factual basis for the one specific allegation contained in them is based on an admitted relationship between appellees and a third party. The truth or falsity of that statement depends on the character and conduct of that third party—a matter which the jury may well have resolved against the plaintiffs on the ground that they could not disprove the allegation on which they bore the burden of proof.[8]

Despite the obvious blueprint for character assassination provided by the decision today, the Court's analytical approach—by attaching little or no weight to the strong state interest in redressing injury to private reputation—provides a wholly unwarranted protection for malicious gossip. As I understand the Court's opinion, its counterintuitive result is derived from a straightforward syllogism. The major premise seems to be that "the First Amendment's protection of true speech on matters of public concern," *ante*, at 777, is tantamount to a command that no rule of law can stand if it will exclude any true speech from the public domain. The minor premise is that although "we cannot know how much of the speech affected by the allocation of the burden of proof is true and how much is false," *ante*, at 776, at least some unverifiable gossip is true. From these premises it necessarily follows that a rule burdening the dissemination of such speech would contravene the First Amendment. Accordingly, "a private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant." *Ante*, at 777.

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[7] The parties agree that "the thrust of the challenged publications was that the Thrifty chain was connected with underworld figures and organized crime. It was that proposition that was required to be proven false." Brief for Appellants 36.

[8] At trial, the individual plaintiff simply denied knowledge of Joseph Scalleat's employment with Beer Sales Consultants and of BSC's employment by three Thrifty stores. See Testimony of Maurice Hepps, Tr. 2185–2186, 2200.

The Court's result is plausible however, only because it grossly undervalues the strong state interest in redressing injuries to private reputations. The error lies in its initial premise, with its mistaken belief that doubt regarding the veracity of a defamatory statement must invariably be resolved in favor of constitutional protection of the statement and against vindication of the reputation of the private individual. To support its premise, the Court relies exclusively on our precedents requiring the government to bear the burden of proving that a restriction of speech is justified. See *ante*, at 777–778. Whether such restrictions appear in the form of legislation burdening the speech of particular speakers or of particular points of view, or of common-law actions punishing seditious libel, the Court is doubtlessly correct that the government or its agents must at a minimum shoulder the burden of proving that the speech is false and must do so with sufficient reliability that we can be confident that true speech is not suppressed. It was to achieve this reliability that the Court, in *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), incorporated into the First Amendment the then-emergent common-law "privilege for [good-faith] criticism of official conduct." *Id.*, at 282. See *id.*, at 282, n. 21. Because "erroneous statement is inevitable in free debate, and [because] it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive, *N.A.A.C.P.* v. *Button*, 371 U. S. 415, 433 [1963],'" *id.*, at 271–272, this privilege is defeasible only if the defamatory statement "was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not," *id.*, at 279–280. "Allowance of the defense of truth, with the burden of proving it on the defendant," was found wanting because it did not "mean that only false speech [would] be deterred"—doubts regarding whether truth "can be proved in court or fear of the expense of having to do so" would force good-faith critics of official conduct to "'steer far wider of the unlawful zone,'" *id.*, at 279 (quoting *Speiser* v. *Randall*, 357 U. S. 513, 526 (1958)).[9]

Even assuming that attacks on the reputation of a public figure should be presumed to be true, however, a different calculus is appropriate when a defamatory statement disparages the reputation of a private individual.[10] In that case, the overriding concern for reliable protection of truthful statements must make room for "[t]he legitimate state interest underlying the law of libel"—"the compensation of individuals for the harm inflicted on them by defamatory falsehood." *Gertz* v. *Robert Welch, Inc.*, 418 U. S., at 341. A public official, of course, has no "less interest in protecting his reputation than an individual in private life." *Rosenbloom* v. *Metromedia*, 403 U. S. 29, 46 (1971) (opinion of

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[9] The *New York Times Co.* v. *Sullivan* privilege was subsequently extended to "public figures." See *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 164 (1967) (Warren, C. J., concurring in result).

[10] If the issue were properly before us, I would be inclined to the view that public figures should not bear the burden of disproving the veracity of accusations made against them with "actual malice," as the *New York Times* Court used that term. The contrary remarks in cases such as *Garrison* v. *Louisiana*, 379 U. S. 64, 74 (1964), were not necessary to the decisions in those cases, and they do not persuade me that the constitutional value in truthful statements requires any more protection of defamatory utterances whose truth may not be ascertained than is provided by the *New York Times* test.

BRENNAN, J.). But private persons are "more vulnerable to injury" and "more deserving of recovery"—more vulnerable because they lack "access to the channels of effective communication . . . to counteract false statements"; more deserving because they have "relinquished no part of [their] good name[s]" by "thrust[ing] themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Gertz* v. *Robert Welch, Inc.*, 418 U. S., at 344–345.

Recognition of the "strong and legitimate [state] interest in compensating private individuals for injury to reputation," *id.*, at 348–349, exposes the untenability of the Court's methodology: the burden of proof in "private-figure" libel suits simply cannot be determined by reference to our precedents having the reputations of "public figures" in mind. In libel cases brought by the latter category of plaintiffs,

> "we view an erroneous verdict for the plaintiff as most serious. Not only does it mulct the defendant for an innocent misstatement . . . but the possibility of such error . . . would create a strong impetus toward self-censorship, which the First Amendment cannot tolerate." *Rosenbloom* v. *Metromedia*, 403 U. S., at 50 (opinion of BRENNAN, J.).

In libel suits brought by private individuals, in contrast, "the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain." *Gertz* v. *Robert Welch, Inc.*, 418 U. S., at 343. To be sure, both categories of cases involve "speech that matters." *Id.*, at 341. But "[t]he extension of the *New York Times* test" to every item of public interest "would abridge this legitimate state interest to a degree that we find unacceptable." *Id.*, at 346.[11] Accordingly, in *Gertz* v. *Robert Welch, Inc.*, this

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[11] See 418 U. S., at 342 ("Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test").

Court rejected the *Rosenbloom* plurality's assumption that the risk of error must invariably be borne by the libel plaintiff, regardless of his or her status, as long as the defamatory statement touches "matters of public or general concern." *Rosenbloom* v. *Metromedia*, 403 U. S., at 44. *Gertz* thus forecloses the Court's unacknowledged reliance on the discredited analysis of the *Rosenbloom* plurality; where private-figure libel plaintiffs are involved, the First Amendment does *not* "requir[e] us to tip [the scales] in favor of protecting true speech" merely because that speech addresses "matters of public concern." *Ante*, at 776. See 418 U. S., at 345–346. See also *Time, Inc.* v. *Firestone*, 424 U. S., at 454–456 (refusing to "reinstate the doctrine advanced in the plurality opinion in *Rosenbloom*" in the guise of protection for inaccurate reporting on "public controversies" or on judicial proceedings).

In my view, as long as publishers are protected by the requirement that the plaintiff has the burden of proving fault, there can be little, if any, basis for a concern that a significant amount of true speech will be deterred unless the private person victimized by a malicious libel can also carry the burden of proving falsity. The Court's decision trades on the good names of private individuals with little First Amendment coin to show for it.

I respectfully dissent.

UNITED STATES *v.* QUINN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84–1717. Argued March 5, 1986—Decided April 21, 1986

Certiorari dismissed. Reported below: 751 F. 2d 980.

Mark I. Levy argued the cause for the United States. With him on the briefs were *Solicitor General Fried, Assistant Attorney General Trott, Deputy Solicitor General Frey,* and *Joel M. Gershowitz.*

Eugene G. Iredale argued the cause for respondent. With him on the brief was *Patrick Q. Hall.*

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

CHIEF JUSTICE BURGER, with whom JUSTICE BLACKMUN joins, dissenting.

We granted certiorari to decide the following question:

> "Whether a defendant has a Fourth Amendment expectation of privacy that entitles him to challenge the search of a boat, which he had never personally used prior to the search and which had been out of his custody and control for two months at the time of the search, on the grounds that he was the owner of the boat and was a coventurer in a criminal enterprise involving the use of the boat by others to smuggle marijuana in which he had a possessory interest."

The question presented is one of considerable significance. It frequently arises in criminal prosecutions because drug smugglers often purchase vessels or airplanes for others to use in criminal enterprises. Given the massive infusion of dangerous drugs into this country by water and air we have an obligation to decide the issue presented. The drug problem presents as great a danger to the United States as any foreign power or fiscal problem.

I

Here are the uncontested facts: Having solicited one Hunt to assist in a drug-smuggling scheme, respondent Quinn purchased a 54-foot vessel—the *Sea Otter*—and gave possession to Hunt. Hunt took the *Sea Otter* to Colombia and picked up roughly 12,000 pounds of marijuana, which he then delivered to Quinn's ranch in California. On June 27, 1979, California Fish and Game officials, suspecting that the *Sea Otter* had been engaged in unlawful fishing operations, boarded the vessel where they observed marijuana "debris" in plain view. They left and notified the United States Coast Guard and the Customs Service of their suspicions that the *Sea Otter* had been used in a marijuana-smuggling operation.

Federal officials intercepted the *Sea Otter* at sea and boarded. The crew could not produce documentation for the boat. Hunt admitted that he had not contacted either the Coast Guard or the Immigration and Naturalization Service, as required by law, when the vessel arrived at the California coast. The officials took the vessel to a nearby Coast Guard station. The forward holds were pumped out and material later identified as marijuana was discovered.

Quinn was arrested and charged with importation and possession of marijuana. He moved to suppress all evidence seized and obtained as result of the stop and search of the *Sea Otter*, arguing that his Fourth Amendment rights as the owner of the *Sea Otter* had been violated. The District Court found that because Quinn had turned the boat over to others he had no standing to contest the search. Quinn then entered a conditional guilty plea, preserving his right to appeal the District Court's decision that he lacked standing to contest the search.

A divided panel of the Court of Appeals for the Ninth Circuit reversed and remanded. 751 F. 2d 980 (1984). The majority found that Quinn had an expectation of privacy based on the "conjunction" of several factors: Quinn's ownership of the vessel; "[h]is possessory interest in the marijuana seized, arising from his joint venture with Hunt"; "[t]he fact that the boat, when searched, was returning from a delivery of marijuana to [Quinn] and was, thus, pursuing the purpose of [Quinn's] joint venture"; and the fact that "reasonable precautions had been taken to preserve privacy." *Id.*, at 981.

II

On this record we should reverse the Court of Appeals. It is axiomatic that the Fourth Amendment guarantee against unreasonable searches and seizures protects personal privacy interests, not property rights. Thus, the "capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Rakas* v. *Illinois*, 439 U. S. 128, 143 (1978).

Here the record is clear that Quinn, notwithstanding his naked title interest in the *Sea Otter*, had never made personal use of the vessel that would give rise to a legitimate expectation of privacy. At the time of the search he had never kept private quarters on the boat or used it as a repository of personal effects. Quinn purchased the vessel for the specific purpose of having others operate it to smuggle drugs into the United States. Moreover, Quinn did not exert any control over the boat: his partner Hunt had complete control over the vessel at all times preceding the search and for two years thereafter while he used it for commercial fishing in Costa Rica. These facts afford no basis for any claim to an expectation of privacy in the *Sea Otter*.

The Court of Appeals' contrary conclusion rests on a fundamental misconception of the scope of the Fourth Amendment.

Under the reasoning of the Court of Appeals, an owner's Fourth Amendment rights would extend not to just a single boat but to a fleet of vessels, airplanes, or trucks merely because he has held legal title to and sent these conveyances into an illegal drug-smuggling enterprise. But the Fourth Amendment only extends to what people seek to "preserve as private." *Katz* v. *United States*, 389 U. S. 347, 351 (1967). The Court of Appeals reasoned that since the marijuana was found in the hold of the vessel, "reasonable precautions had been taken to preserve privacy." 751 F. 2d, at 981. Even if this inference is warranted from the facts, it is irrelevant because there is no indication that *Quinn* took any precautions whatsoever. "Fourth Amendment rights are personal rights which, like some other constitutional rights, *may not be vicariously asserted.*" *Rakas* v. *Illinois*, *supra*, at 133–134 (emphasis added). That someone other than the title holder took steps indicating an expectation of privacy has no bearing on whether Quinn's Fourth Amendment rights were violated.

The Court of Appeals' conclusion that Quinn's status as a "co-venturer" with those who exerted control over the vessel and his possessory interest in the contraband gave him standing to challenge the search is similarly misguided. Under this flawed analysis, if a defendant has a sufficient link to seized contraband to incriminate him, the guarantees of the Fourth Amendment attach. But it is the established rule that suppression of evidence "can be successfully urged *only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence.* Coconspirators and codefendants have been accorded no special standing." *Alderman* v. *United States*, 394 U. S. 165, 171–172 (1969) (emphasis added). Unless Quinn can demonstrate a reasonable expectation of privacy in the place searched, neither his involvement in the criminal enterprise, see *Alderman*, *supra*, nor his naked possessory interest in the seized evidence, see *United States* v.

Salvucci, 448 U. S. 83 (1980); *Rawlings* v. *Kentucky*, 448 U. S. 98 (1980), establishes a Fourth Amendment violation.

The District Court, therefore, correctly held that suppression was not warranted because Quinn had not manifested a reasonable expectation of privacy in the *Sea Otter*. I regard it as an error of gravest consequences to allow the erroneous holding of the Court of Appeals to stand when the country is being flooded at its borders with dangerous drugs. I would therefore reverse the judgment of the Court of Appeals.

CITY OF LOS ANGELES ET AL. *v.* HELLER

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85-531. Decided April 21, 1986

Respondent was stopped by Los Angeles police officers, who suspected that he was driving while intoxicated, and was told that he was under arrest. When an officer attempted to handcuff him, an altercation developed and respondent fell through a plate-glass window. Respondent filed suit in Federal District Court under 42 U. S. C. § 1983, claiming damages from arrest without probable cause and from excessive force in the making of the arrest. During a bifurcated trial, his claims against the police officer were heard first, and the jury was instructed that respondent would make out his constitutional claim if he demonstrated he had been arrested without reasonable cause or with "unreasonable force" that exceeded the force necessary under the circumstances to effect arrest. The jury was not instructed on any affirmative defenses that might have been asserted by the officer. The jury returned a verdict for the officer, and the District Court dismissed the action against petitioners, the city and members of its Police Commission. The Court of Appeals reversed the judgment dismissing the case against petitioners, even though it did not disturb the verdict for the officer.

Held: The Court of Appeals erred in apparently basing its reversal on the grounds that the jury could have believed that the officer, having followed Police Department regulations, was entitled in substance to a defense of good faith, and that such a belief would not negate the existence of a constitutional injury. The jury was not charged on any affirmative defense that the officer might have had—such as good faith and qualified immunity—and the theory under which jury instructions are given, and reviewed on appeal, provides that juries act in accordance with the instructions given them and do not base their decisions on legal questions as to which they are not charged. The jury's finding of no constitutional injury was conclusive not only as to the officer, but also as to petitioners. Petitioners were sued only because they were thought legally responsible for the officer's actions; if the latter inflicted no constitutional injury on respondent, petitioners cannot be liable in damages to respondent, regardless of whether departmental regulations might have *authorized* the use of constitutionally excessive force.

Certiorari granted; 759 F. 2d 1371, reversed and remanded.

PER CURIAM.

Respondent Ronald Heller sued petitioners, city of Los Angeles and individual members of the Los Angeles Police Commission, and two Los Angeles police officers in the United States District Court for the Central District of California under the provisions of 42 U. S. C. § 1983. He claimed damages by reason of having been arrested without probable cause and having been the victim of excessive force in the making of the arrest. The incident arose as a result of the two Los Angeles police officers stopping him because of a suspicion that he was driving while intoxicated. In the words of the Court of Appeals for the Ninth Circuit:

> "The officers administered a series of field sobriety tests. Apparently dissatisfied with the results, the officers decided to take Heller to the station to undergo a breath test. When notified that he was under arrest, however, Heller became belligerent. One of the defendants, Officer Bushey, attempted to handcuff him. An altercation ensued. In the course of the struggle, Heller fell through a plate glass window." *Heller* v. *Bushey*, 759 F. 2d 1371, 1372–1373 (1985).

The District Court held a bifurcated trial, and first heard respondent's claims against one of the individual police officers.* The jury was instructed that Heller would make out his constitutional claim if he were arrested without reasonable cause, or if he were arrested with "unreasonable force" that exceeded the force necessary under the circumstances to effect arrest. *Id.*, at 1374. The jury was not instructed on any affirmative defenses that might have been asserted by the individual police officer. Tr. in No. 80–2643 (CD Cal.), pp. 803–822, 843. The jury returned a verdict for the defendant police officer and against respondent. The District Court then dismissed the action against petitioners, concluding that if the police officer had been exonerated by the jury there could be no basis for assertion of liability against the city or the persons constituting its Police Commission.

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*The second of the two police officers named as defendants was granted summary judgment by the District Court.

Respondent appealed to the Court of Appeals for the Ninth Circuit, and that court reversed the judgment of the District Court dismissing respondent's case against petitioners even though it did not disturb the verdict for the defendant police officer. Respondent urged, and the Court of Appeals apparently agreed, that "the jury could have believed that Bushey, having followed Police Department regulations, was entitled in substance to a defense of good faith. Such a belief would not negate the existence of a constitutional injury" (footnote omitted). 759 F. 2d, at 1373–1374.

The difficulty with this position is that the jury was not charged on any affirmative defense such as good faith which might have been availed of by the individual police officer. Respondent contends in his brief in opposition to certiorari that even though no issue of qualified immunity was presented to the jury, the jury might nonetheless have considered evidence which would have supported a finding of such immunity. But the theory under which jury instructions are given by trial courts and reviewed on appeal is that juries act in accordance with the instructions given them, see *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U. S. 585, 604 (1985), and that they do not consider and base their decisions on legal questions with respect to which they are not charged. We think that the Court of Appeals' search for ambiguity in the verdict was unavailing; as that court itself noted later in its opinion, "[b]ecause the instructions required a verdict for [respondent] if *either* the due process *or* the excessive force claim was found, the jury's verdict for the defendant required a negative finding on both claims." 759 F. 2d, at 1374, n. 3. This negative, it seems to us, was conclusive not only as to Officer Bushey, but also as to the city and its Police Commission. They were sued only because they were thought legally responsible for Bushey's actions; if the latter inflicted no constitutional injury on respondent, it is inconceivable that petitioners could be liable to respondent.

The Court of Appeals also stated:

> "We must conclude that the general verdict does not foreclose a finding that Heller suffered a constitutional deprivation. Heller's *Monell* claim survived the general verdict. . . . The jury verdict, of course, conclusively determined that there was probable cause to arrest Heller. On the other hand, it is equally clear that whether the application of force in accordance with Police Department regulations in this case exceeded constitutional limits has not been determined." *Id.*, at 1374–1375.

But this was an action for damages, and neither *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm. If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point.

The petition for certiorari is granted, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BRENNAN took no part in the consideration or decision of this case.

JUSTICE MARSHALL dissents from this summary disposition, which has been ordered without affording the parties prior notice or an opportunity to file briefs on the merits. See *Cuyahoga Valley R. Co.* v. *Transportation Union*, 474 U. S. 3, 8 (1985) (MARSHALL, J., dissenting); *Maggio* v. *Fulford*, 462 U. S. 111, 120–121 (1983) (MARSHALL, J., dissenting).

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, dissenting.

Whenever the Court decides a case without the benefit of briefs or argument on the merits, there is a danger that it will issue an opinion without the careful deliberation and explication that the issues require. Today's "*per curiam*" opinion is a fair illustration of the problem. The two important issues presented in this case are not even identified in that document. The District Court's decision to dismiss the action against the city, the Police Department, and the Police Commissioners necessarily rested on two assumptions: (1) there was an inherent inconsistency between the jury verdict in favor of Officer Bushey and a possible verdict against the municipal defendants and (2) that inconsistency required the dismissal of the action against the municipal defendants. Far from specifically addressing those issues, however, the District Court dismissed the action against the city on the ground that it had "become moot."[1] In a similar vein, this

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[1] See 8 Record 844 ("With respect to the Monell cause of action, which was bifurcated from the initial trial, the Court is now convinced that has become moot by reason of the verdict in favor of the defendant and the Court is ordering dismissal of that cause of action at this time"); 2 *id.*, Doc. No. 209, dismissal order ("the plaintiff's theory of liability against the defendants, CITY OF LOS ANGELES, LOS ANGELES BOARD OF POLICE COMMISSIONERS and LOS ANGELES POLICE DEPARTMENT, based on the case of *Monell* v. *Department of Social Services of the City of New York*, 436 U. S. 658 . . . is moot").

Court rests its summary decision on the maxim that "juries act in accordance with the instructions given them." *Ante*, at 798. In my view, neither of the necessary assumptions for the District Court's action—and for this Court's reinstatment of its decision—is remotely present in this case.

I

The first necessary assumption is that there would be an inevitable inconsistency between the jury verdict of no liability for Officer Bushey and a possible verdict of liability against the municipal entities; in the absence of such an inconsistency, the District Court's decision, and this Court's reinstatement of it, are simply inexplicable.

It is undisputed that Ronald Heller crashed through a plate-glass window after some kind of an altercation with Officer Bushey. He had been stopped on suspicion of driving while intoxicated and given sobriety tests.[2] In his claim against the municipal entities, Heller contended that the city and the Police Department had adopted a policy of condoning excessive force in making arrests, that the policy was unlawful, and that he had been injured by the application of that policy at the time of his arrest. In his claim against Officer Bushey, Heller contended that his constitutional rights were violated because Officer Bushey had employed "unreasonable force" in arresting him.

On the day before trial, the District Judge bifurcated the trial into two phases—the first against Officer Bushey and the second against the municipal entities. The record contains no explanation for this decision, but it does reveal that Heller's counsel opposed bifurcation.[3]

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[2] After the altercation, Heller was given an alcohol level test, and was found to have one-tenth the level of alcohol in his body necessary for a finding of driving while intoxicated under California law. 5 *id.*, at 134–136. Heller was never charged with driving while intoxicated. *Ibid.*

[3] See 5 *id.*, Doc. No. 203, minutes of chambers conference (Oct. 18, 1982) ("Court confers with Counsel re: Pretrial order, Jury trial on 10/19/82, Jury Instructions, Defendant's amended witness list and bifurca-

In the proceeding against Officer Bushey, considerable evidence of the Los Angeles Police Department's policy and custom on the use of force was introduced. An expert witness testified regarding Los Angeles' officially sanctioned use of "escalating force," culminating in the use of the notorious "chokehold."[4] Officer Bushey himself testified that Heller's flight through the window resulted from his attempt to impose a chokehold, and that he was carefully following official Police Department policy.[5] Officer Bushey's superior, Sergeant Shrader, also testified that Officer Bushey's actions were in complete compliance with official Police Department policy.[6] Finally, Officer Bushey's attorney repeatedly

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tion of case. Plaintiff counsel opposes Bifurcation. Defendant does not oppose bifurcation").

[4] See 5, *id.*, at 157–158 (testimony of James Fyfe) ("The Los Angeles Police Department employs a scale of escalation in the use of force. . . . [T]he Los Angeles Police Department varies from every other major police department I know of. The Los Angeles Police Department says that if that compliance hold fails to work the next degree of force to be used is a chokehold or, as the police department calls them, a carotid control hold and modified carotid hold and bar arm control holds"). Cf. *Los Angeles* v. *Lyons*, 461 U. S. 95, 97, n. 1 (1983) (describing chokehold); *id.*, at 114–119 (MARSHALL, J., dissenting) (reviewing Los Angeles Police Department's use of chokeholds and noting that 16 deaths had resulted from chokeholds since 1975). At the time of Heller's trial, *Lyons* was pending before this Court.

[5] 5 Record 99–100 ("As he began his two steps forward I applied—I put my left arm around his—the portion I tried to get was the front part of his throat. You use the blade of your wrist on the person's throat. As we are supposed to when we are trying to take someone into custody use verbal commands of first asking verbally and then demanding verbally. If that does not work we use what is called a pain compliance, which is trying to twist someone's wrist where the pain hurts them and they'll comply with your request. . . . I tried to get the blade of my wrist around to his throat to apply pressure to his throat, which is also a pain compliance hold").

[6] See 6 *id.*, at 279–281 (testimony of Sergeant Shrader) (describing Police Department's "accelerated force theory" and concluding that Officer Bushey's use of a chokehold would have been "within the policy").

emphasized that his client's actions were entirely consistent with established Department policy.[7]

In submitting the claim against Officer Bushey to the jury, the trial judge gave an instruction that simply stated that whether or not the force used in making an arrest is unreasonable "is an issue to be determined in the light of all the surrounding circumstances."[8] After deliberating several hours, the jury returned a general verdict in favor of the officer.

Thus, despite the majority's summary assertion to the contrary, it is perfectly obvious that the general verdict rejecting the excessive force claim against Officer Bushey did not necessarily determine the constitutionality of the city's "escalating force" policy—a subject on which the jury had received no instructions at all. The verdict merely determined that the officer's action was not unreasonable "in the light of all the surrounding circumstances"—which, of course, included the evidence that Officer Bushey was merely obeying orders and following established Police Department policy.

As a result, there was no necessary inconsistency between the verdict for Officer Bushey and a possible verdict of liability against the municipal defendants. On that basis alone, the District Court plainly erred in dismissing as "moot" the suit against the municipal defendants, and the Court of Appeals was plainly correct to reverse the dismissal.[9]

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[7] See, *e. g.*, 5 *id.*, at 170 ("[T]he carotid hold was a hold that was being taught to the Los Angeles Police Department"); 6 *id.*, at 279 (referring to "the accelerated force theory that the police department has"); *id.*, at 281 (referring to "the policy of what police department officers do"). See also Officer Bushey's counsel's closing argument, 7 *id.*, at 699 ("In this case it's not the City that's the defendant. It's Officer Bushey"); *id.*, at 706 (citing "testimony concerning our own policies and procedures as to the Los Angeles Police Department"); *ibid.* ("[T]he procedures which Officer Bushey followed are exactly what he's taught and the reasons he's taught to do it"); *id.*, at 716 ("It's Officer Bushey who's the defendant"); *id.*, at 718 ("Officer Bushey was trying to do his job").

[8] "Whether or not the force used in making an arrest, preventing an escape, or overcoming resistance was expressive *[sic]*, unreasonable or violent is an issue to be determined in the light of all the surrounding circumstances." 8 *id.*, at 815–816.

II

In view of the fact that the Court of Appeals correctly concluded that there was no necessary inconsistency between a verdict exonerating Officer Bushey and a verdict holding the city and Police Department liable for the "escalating force" policy, it did not have to consider the appropriate response to a possible inconsistency in the context of a bifurcated trial.

Inconsistent verdicts are, of course, a familiar phenomenon. In a criminal case, a jury's apparently inconsistent verdict is allowed to stand.[10] In a civil case, the rule is less clear.[11] Nevertheless, in contrast to the Court's blithe assumption today, it is far from certain that the District Court's action—the dismissal—was an appropriate response, even if somehow a verdict against the municipal entities might have created an inconsistency. First, the Court ignores the fact that, in certain circumstances, a court retains the authority, even in a civil case, to allow an apparently inconsistent verdict to stand.[12] Second, the Court ignores the

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[9] The Court of Appeals concluded:

"The jury, in substance, was instructed that Heller was deprived of liberty without due process if he was arrested without reasonable cause. The jurors were further instructed that Heller's constitutional rights were violated if he was arrested with "unreasonable force" that exceeded the force necessary under the circumstances to effect arrest. The jury's verdict for the defendant therefore embodies a finding that Heller was arrested for reasonable cause *and* that the amount of force used was not unreasonable or excessive. The difficulty is that the conclusion that the force was reasonable could have been derived either from Police Department regulations, which incorporate a theory of 'escalating force,' or from a constitutional standard entirely independent of such regulations. We cannot say which with assurance." *Heller* v. *Bushey*, 759 F. 2d 1371, 1374 (CA9 1985) (footnote omitted).

[10] See *United States* v. *Powell*, 469 U. S. 57 (1984) (reaffirming general rule that inconsistent verdicts can stand); *Harris* v. *Rivera*, 454 U. S. 339, 345 (1981) ("Inconsistency in a verdict is not a sufficient reason for setting it aside"); *Hoag* v. *New Jersey*, 356 U. S. 464, 472 (1958) ("[J]ury verdicts are sometimes inconsistent or irrational"); *United States* v. *Dotterweich*, 320 U. S. 277, 279 (1943) ("Whether the jury's verdict was the result of carelessness or compromise or a belief that the responsible individual should suffer the penalty instead of merely increasing, as it were, the cost of running the business of the corporation, is immaterial. Juries may indulge in precisely such motives or vagaries"); *Dunn* v. *United States*, 284 U. S. 390, 393 (1932) ("Consistency in the verdict is not necessary").

Cf. *Ulster County Court* v. *Allen*, 442 U. S. 140, 168 (1979) (BURGER, C. J., concurring) ("Courts have long held that in the practical business of deciding cases the factfinders, not unlike negotiators, are permitted the luxury of verdicts reached by compromise").

[11] See, *e. g.*, Bickel, Judge and Jury—Inconsistent Verdicts in the Federal Courts, 63 Harv. L. Rev. 649, 654 (1950) ("[T]here is not in a civil case the equivalent of a precedent such as *Dunn* [v. *United States*, *supra*] to overrule in upsetting inconsistent verdicts. The argument outlined against extending the *Dunn* rule to civil cases is thus quite a plausible one. But it is not unanswerable") (footnote omitted).

[12] Indeed, in explaining why an apparently inconsistent verdict in a civil case should not be disturbed, Justice Brandeis cited the leading case on the permissibility of inconsistent verdicts in a criminal context. See *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 474, 485 (1933) (citing *Dunn* v. *United States*). See also F. James & G. Hazard, Civil Procedure 384 (3d ed. 1985) ("[T]he refusal of a trial court to set aside a verdict obviously representing a compromise has frequently, and quite properly, been upheld"); *id.*, at 394 ("One of the great values of jury trial . . . is its ability to reflect the community sense of over-all fairness, and this may not in all cases coincide with the written law and the instructions which the court must give"); *Karcesky* v. *Laria*, 382 Pa. 227, 235, 114 A. 2d 150, 154 (1955) ("Where the evidence of negligence, or contributory negligence, or both, is conflicting or not free from doubt, a trial judge has the power to uphold the time-honored right of a jury to render a compromise verdict, and to sustain a verdict which is substantial"); *Jayne* v. *Mason & Dixon Lines, Inc.*, 124 F. 2d 317, 319 (CA2 1941) (L. Hand) ("We do not mean to imply however that we should have thought it fatal to the wife's recovery if no rational reconciliation of the verdicts was possible. *Dunn* v. *United States*, 284 U. S. 390"). Cf. Note, Inconsistent Verdicts in Civil Trials, 45 Harv. L. Rev. 1230, 1234 (1932) (observing that, in some jurisdictions, "a master can not complain solely because the servant was exonerated at the same trial. If the evidence is sufficient to support the verdict against the master, his appeal will be denied") (footnote omitted).

fact that, when faced with an apparently inconsistent verdict, a court has a duty to attempt to read the verdict in a manner that will resolve inconsistencies.[13] Third, the Court ignores the fact that, upon receiving an apparently inconsistent verdict, the trial judge has the responsibility, not to retain half of the verdict, but to resubmit the question to the jury.[14] Finally, the Court ignores the fact that, if verdicts are genuinely inconsistent and if the evidence might support either of the "inconsistent" verdicts, the appropriate remedy is ordinarily, not simply to accept one verdict and dismiss the other, but to order an entirely new trial.[15]

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[13] See *Gallick* v. *Baltimore & Ohio R. Co.*, 372 U. S. 108, 119 (1963) (In considering jury answers to questions in a special verdict, "it is the duty of the courts to attempt to harmonize the answers, if it is possible under a fair reading of them . . . . We therefore must attempt to reconcile the jury's findings, by exegesis if necessary, . . . before we are free to disregard the jury's special verdict and remand the case for a new trial"); *Atlantic & Gulf Stevedores, Inc.*, v. *Ellerman Lines, Ltd.*, 369 U. S. 355, 364 (1962) ("Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way"); *Affolder* v. *New York, Chi. & St. L. R. Co.*, 339 U. S. 96 (1950); *Fairmount Glass Works*, 287 U. S., at 485 (Brandeis, J.) ("Appellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct"); *Union Pacific R. Co.* v. *Hadley*, 246 U. S. 330, 334 (1918) (Holmes, J.) ("[S]ince the [jury] finding was possible on the evidence it cannot be attributed to disregard of duty. . . . Beyond the question of attributing misconduct to the jury we are not concerned to inquire whether its reasons were right or wrong").

[14] See, *e. g.*, *Dickerson* v. *Pritchard*, 706 F. 2d 256, 259 (CA7 1983) ("[T]he trial court properly resubmitted the inconsistent verdicts to the jury for reconsideration"); *University Computing Co.* v. *Lykes-Youngstown Corp.*, 504 F. 2d 518, 547 (CA5 1974) ("[I]f the jury returns two inconsistent verdicts, the trial court may resubmit the issue to them for clarification"); *Hopkins* v. *Coen*, 431 F. 2d 1055, 1059 (CA6 1970) (upon receipt of inconsistent verdicts, trial court could have sent jury "back to the jury room to further deliberate with appropriate instructions to bring back consistent verdicts"); *Alston* v. *West*, 340 F. 2d 856, 858 (CA7 1965) (when jury returned an inconsistent verdict, "the court properly exercised its discretion in resubmitting the case to the jury").

[15] See, *e. g.*, *Malley-Duff & Associates* v. *Crown Life Ins. Co.*, 734 F. 2d 133, 145 (CA3) ("We conclude that the answers to Questions 1, 2(A), and

Although the Court fails to address it, the question this case raises (if, in fact, the initial view of inevitable inconsistency is accepted) is whether a different set of principles should apply in a bifurcated trial—more narrowly, in a trial that was bifurcated over the objection of the plaintiff. Because the question has not been argued, I do not foreclose the possibility that bifurcation should make a difference, but it is not immediately apparent to me why it should. In this case, the same jury would have passed on the municipal entities' liability, and would have relied on the evidence adduced in the first phase of the trial as well as that presented in the second phase. At the very least, it is unclear to me why the normal devices for addressing an apparently inconsistent verdict—construing the verdict in a manner that resolves the inconsistency; resubmitting the case to the jury for *it* to resolve the inconsistency; or even ordering a new trial—should be unavailable in a bifurcated context.

If the Court's unprecedented, ill-considered, and far-reaching decision happens to be correct, defendants as a class have been presented with a tactical weapon of great value. By persuading trial judges to bifurcate trials in which both the principal and its agents are named as defendants, and to require the jury to bring in its verdict on the individual claim first, they may obtain the benefit of whatever intangible factors have prompted juries to bring in a multitude of inconsistent verdicts in past years; defendants will no longer have to abide the mechanisms that courts have used to mitigate

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2(B) may be considered inconsistent . . . . We will vacate the $900,000 verdict in the state law claims and order a new trial"), cert. denied, 469 U. S. 1072 (1984); *Global Van Lines, Inc.* v. *Nebeker*, 541 F. 2d 865, 868 (CA10 1976) (citing "the rule which says that inconsistencies which show jury confusion serve to mandate a new trial"); *Wood* v. *Holiday Inns, Inc.*, 508 F. 2d 167, 175 (CA5 1975) ("Where verdicts in the same case are inconsistent on their faces indicating that the jury was confused, a new trial is certainly appropriate and may even be required"). Cf. Fed. Rule Civ. Proc. 49(b) (appropriate remedy for inconsistent special verdicts and general verdict is resubmission to the jury, or a new trial).

and resolve apparent inconsistencies.[16] Perhaps that is an appropriate response to the current widespread concern about the potential liabilities of our municipalities, but I doubt it. Cf. *Oklahoma City* v. *Tuttle*, 471 U. S. 808, 843–844 (1985) (STEVENS, J., dissenting).

III

The Court today reverses an interlocutory decision in a constitutional rights case on the basis of assumptions that dramatically conflict with the record and with settled legal principles. The Court mistakenly assumes that there was a necessary inconsistency between the verdict of no liability against the individual officer and a possible verdict against the municipal defendants; it then mistakenly assumes that dismissal was an appropriate response to the perceived inconsistency. Perhaps not coincidentally, the Court achieves these results without the aid of briefs or argument, and relies on an anonymous author to explain what it has done.

I respectfully dissent.

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[16] Cf. *Alston* v. *West*, *supra* (in negligence suit against flower shop and driver for automobile accident, jury initially returned verdict of liability for flower shop and no liability for driver; after case was resubmitted, jury returned liability verdicts against both employer and driver).

DENNISON MANUFACTURING CO. *v.* PANDUIT CORP.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 85-1150. Decided April 21, 1986

Respondent, which holds patents for plastic cable ties, sued petitioner in Federal District Court for infringement, and petitioner defended on the ground that the patents were invalid for obviousness. After examining the prior art, identifying the differences between it and the patents at issue, and ultimately concluding that all of the improvements made by the patents over the prior art would have been obvious to one skilled in that art, the court held that respondent's patents were invalid for obviousness. The Court of Appeals reversed, disagreeing with the District Court's assessment of the prior art, and ruling that the references cited by the District Court did not teach the innovations introduced by respondent. Petitioner contends that the Court of Appeals improperly ignored Federal Rule of Civil Procedure 52(a) in substituting its view of factual issues for that of the District Court.

Held: Regardless of whether the ultimate question of obviousness is one of fact subject to the clearly-erroneous standard of Rule 52(a), the District Court's subsidiary determinations, at the least, are subject to the Rule. The Court of Appeals, however, did not mention the Rule, did not explicitly apply the clearly-erroneous standard to any of the District Court's findings on obviousness, and did not explain why, if it was of that view, the Rule had no applicability to the issue of obviousness. In the absence of an opinion clearly setting forth the Court of Appeals' views on such matters, plenary consideration will not be given here to petitioner's claim that the decision below cannot be squared with the Rule. Instead, the Court of Appeals' judgment is vacated, and the case is remanded to that court for further consideration in light of the Rule.

Certiorari granted; 774 F. 2d 1082, vacated and remanded.

PER CURIAM.

Respondent holds three patents for plastic cable ties, products that are commercially successful. Petitioner copied respondent's products, was sued for patent infringement in the Northern District of Illinois, and defended on the ground that the patents were invalid for obviousness. The trial judge examined the prior art, identified the differences between the prior art and each of the three patents at issue, and concluded that all of the improvements made by the three patents over the prior art would have been obvious to one skilled in that art. In the course of arriving at this conclusion, the trial judge recognized that the presumption of patent validity must be overcome by clear and convincing evidence, that the patents' commercial success and the failure of competitors to develop equally successful inventions were important factors weighing in favor of the validity of the patents, and that in addressing the question of obviousness a judge must not pick and choose isolated elements from the prior art and combine them so as to yield the invention in question if such a combination would not have been obvious at the time of the invention. Nonetheless, the judge found that respondent's patents were invalid for obviousness.

The Court of Appeals for the Federal Circuit reversed. 774 F. 2d 1082 (1985). The court disagreed with the District Court's assessment of the prior art, ruled that the references cited by the District Court did not teach the innovations introduced by respondent, and referred to other errors made by the District Court.

Petitioner contends that the Federal Circuit ignored Federal Rule of Civil Procedure 52(a) in substituting its view of factual issues for that of the District Court. In particular, petitioner complains of the rejection of the District Court's determination of what the prior art revealed and its findings that the differences identified between respondent's patents and the prior art were obvious.

Petitioner's claims are not insubstantial. As this Court observed in *Graham* v. *John Deere Co.*, 383 U. S. 1, 17–18 (1966):

> "While the ultimate question of patent validity is one of law, . . . the § 103 condition [that is, nonobviousness] . . . lends itself to several basic factual inquiries. Under § 103, the scope and content of the prior art are to be

> determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined. Such secondary considerations as commercial success, long felt but unresolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented. As indicia of obviousness or nonobviousness, these inquiries may have relevancy."

This description of the obviousness inquiry makes it clear that whether or not the ultimate question of obviousness is a question of fact subject to Rule 52(a), the subsidiary determinations of the District Court, at the least, ought to be subject to the Rule.

The Federal Circuit, however, did not mention Rule 52(a), did not explicitly apply the clearly-erroneous standard to any of the District Court's findings on obviousness, and did not explain why, if it was of that view, Rule 52(a) had no applicability to this issue. We therefore lack an adequate explanation of the basis for the Court of Appeals' judgment: most importantly, we lack the benefit of the Federal Circuit's informed opinion on the complex issue of the degree to which the obviousness determination is one of fact. In the absence of an opinion clearly setting forth the views of the Court of Appeals on these matters, we are not prepared to give plenary consideration to petitioner's claim that the decision below cannot be squared with Rule 52(a). Instead, we grant the petition for certiorari, vacate the judgment, and remand the case to the Court of Appeals for further consideration in light of Rule 52(a).

It is so ordered.

JUSTICE MARSHALL dissents from this summary disposition, which has been ordered without affording the parties prior notice or an opportunity to file briefs on the merits. See *Cuyahoga Valley R. Co.* v. *United Transportation Union*, 474 U. S. 3, 8 (1985) (MARSHALL, J., dissenting); *Maggio* v. *Fulford*, 462 U. S. 111, 120–121 (1983) (MARSHALL, J., dissenting).

AETNA LIFE INSURANCE CO. *v.* LAVOIE ET AL.

APPEAL FROM THE SUPREME COURT OF ALABAMA

No. 84-1601. Argued December 4, 1985—Decided April 22, 1986

When appellant insurer refused to pay the full amount of a hospital bill incurred by appellees, they brought suit in an Alabama state court, seeking both payment of the full amount and punitive damages for appellant's alleged bad-faith refusal to pay a valid claim. The jury awarded $3.5 million in punitive damages. The Alabama Supreme Court affirmed, 5 to 4, in a *per curiam* opinion written by Justice Embry. Appellant then filed an application for rehearing, and, before the application was acted on, learned that while the case was pending before the Alabama Supreme Court, Justice Embry had filed two actions in an Alabama court against insurance companies alleging bad-faith failure to pay claims and seeking punitive damages. One of the actions was a class action on behalf of all state employees insured under a group plan by Blue Cross-Blue Shield. Appellant then filed motions challenging, on due process grounds, Justice Embry's participation in the *per curiam* decision and his continued participation in considering the rehearing application, and also alleging that all justices on the court should recuse themselves because of their interests as potential class members in the Blue Cross suit. The court denied these motions, and also the rehearing application. Subsequently, the Blue Cross suit was settled, and Justice Embry received $30,000 under that settlement.

Held:

1. This Court has jurisdiction over the question whether Justice Embry's participation in this case violated appellant's rights under the Due Process Clause of the Fourteenth Amendment, where the Alabama Supreme Court's order denying the recusal motions clearly demonstrated that the court reached the merits of appellant's constitutional challenge, and where appellant raised this issue as soon as it discovered the facts relating to Justice Embry's personal lawsuits. Pp. 819-820.

2. Appellant's allegations, on a general basis, of Justice Embry's bias and prejudice against insurance companies that were dilatory in paying claims, were insufficient to establish any constitutional violation. Pp. 820-821.

3. The record, however, presents more than mere allegations of bias and prejudice, and supports the conclusion that Justice Embry's participation in this case violated appellant's due process rights. All of the issues in this case were present in his Blue Cross suit, and the very

nature of that suit placed in issue whether he would have to establish that he was entitled to a directed verdict on the underlying claims that Blue Cross refused to pay before gaining punitive damages. Moreover, the affirmance in this case of the largest punitive damages award ever issued in Alabama on precisely the type of claim raised in the Blue Cross suit "raised the stakes" for Blue Cross in that suit to Justice Embry's benefit. Thus, his opinion for the Alabama Supreme Court had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case. When he made the judgment in this case, he acted as "a judge in his own case." His interest in this case was "'direct, personal, substantial, [and] pecuniary,'" *Ward* v. *Village of Monroeville*, 409 U. S. 57, 60, as shown by the sum he received in settlement of the Blue Cross suit. Pp. 821–825.

4. There is no basis for concluding that the justices of the Alabama Supreme Court other than Justice Embry were disqualified under the Due Process Clause. While those justices might conceivably have had a slight pecuniary interest in this case because of their possible inclusion in the Blue Cross class action, that interest cannot properly be characterized as "direct, personal, substantial, [and] pecuniary." Any interest that they might have had when they passed on the rehearing application was highly speculative and contingent, since at that time the trial court in the Blue Cross suit had not even certified a class, let alone awarded any class relief of a pecuniary nature. Pp. 825–827.

5. Because of Justice Embry's leading role in the decision under review, the "appearance of justice" will best be served by vacating the decision and remanding for further proceedings. Pp. 827–828.

470 So. 2d 1060, vacated and remanded.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed a concurring opinion, *post*, p. 829. BLACKMUN, J., filed an opinion concurring in the judgment, in which MARSHALL, J., joined, *post*, p. 831. STEVENS, J., took no part in the consideration or decision of the case.

Theodore B. Olson argued the cause for appellant. With him on the briefs were *John J. Swenson*, *Larry L. Simms*, *Peter V. Sintz*, and *Wm. M. Cunningham, Jr.*

Jack N. Goodman argued the cause for appellees. With him on the briefs were *Alvin T. Prestwood* and *Joseph M. Brown, Jr.**

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*Briefs of *amici curiae* urging reversal were filed for the Alabama Defense Lawyers Association by *Davis Carr;* for the Association of California

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented is whether the Due Process Clause of the Fourteenth Amendment was violated when a justice of the Alabama Supreme Court declined to recuse himself from participation in that court's consideration of this case.

I

This appeal arises out of litigation concerning an insurance policy issued by appellant covering appellees Margaret and Roger Lavoie. In January 1977, Mrs. Lavoie was examined by her physician, Dr. Douglas, because of various ailments. Shortly thereafter, on Dr. Douglas' recommendation, she was admitted to the Mobile Infirmary Hospital, where she remained for 23 days for a battery of tests.

After her discharge, the hospital forwarded the appropriate forms and medical records along with a bill for $3,028.25 to appellant's local office in Mobile, Alabama. The local office refused to pay the entire amount, tendering payment for only $1,650.22. The local office also sent a letter to the national office, concluding that the 23-day hospitalization was unnecessary and that "[h]ospital records do not indicate anything to the contrary," even though all the hospital records had not yet been received. At one point, the national office told the local office to continue denying the request for full payment, but added that "if they act like they are going to file suit," the file should be reviewed.

Insurance Companies et al. by *Joseph W. Rogers, Jr.*, *Martin Quinn*, and *Susan M. Popik;* for the American Council of Life Insurance et al. by *Erwin N. Griswold*, *Thomas F. Cullen, Jr.*, *Jack H. Blaine*, *Edward J. Zimmerman*, and *John P. Dineen;* for the American Insurance Association et al. by *Ellis J. Horvitz;* for Golden Rule Insurance Co. by *David A. Strauss;* and for the Southeastern Legal Foundation, Inc., by *G. Stephen Parker*.

Briefs of *amici curiae* urging affirmance were filed for the Alabama Trial Lawyers Association by *Lanny S. Vines;* and for the Association of California Trial Lawyers et al. by *Peter Perlman* and *Harvey R. Levine*.

Appellees filed suit against appellant, seeking both payment of the remainder of their original claim and punitive damages for the tort of bad-faith refusal to pay a valid claim. The trial court dismissed for failure to state a cause of action with respect to the bad-faith counts. Appellees appealed to the Alabama Supreme Court, which remanded on the ground that it had "not foreclosed the possibility of recovery in tort for the bad faith refusal of an insurer to pay legitimate benefits due under an insurance policy." *Lavoie* v. *Aetna Life & Casualty Co.*, 374 So. 2d 310, 312 (1979). On remand, the trial court entered judgment for appellees on the unpaid portion of their claim and granted summary judgment for appellant on the bad-faith claim. The Alabama Supreme Court again reversed, explaining that on that same day it had "recognized the intentional tort of bad faith in first party insurance actions." *Lavoie* v. *Aetna Life & Casualty Co.*, 405 So. 2d 17, 18 (1981) (citing *Chavers* v. *National Security Fire & Casualty Co.*, 405 So. 2d 1 (1981)). On remand, appellees' bad-faith claim was submitted to a jury. The jury awarded $3.5 million in punitive damages. The trial judge denied appellant's motion for judgment n.o.v. or, alternatively, for remittitur.

The Alabama Supreme Court affirmed the award in a 5-to-4 decision. 470 So. 2d 1060 (1984). An unsigned *per curiam* opinion expressed the view of five justices that the evidence demonstrated that appellant had acted in bad faith. The court interpreted its prior opinions as not requiring dismissal of a bad-faith-refusal-to-pay claim even where a directed verdict against the insurer on the underlying claim was impossible. The opinion also clarified the issue of whether a bad-faith suit could be maintained where the insurer had made a partial payment of the underlying claim. Although earlier opinions of the court had refused to allow bad-faith suits in such circumstances, partial payment was not dispositive of the bad-faith issue. The court also rejected appellant's argument that the punitive damages award was so excessive that it must be set aside.

Chief Justice Torbert, joined by Justice Beatty, dissented; Justice Maddox, joined by Justice Shores, also dissented, concluding that the case was controlled by the court's earlier decision in *National Savings Life Ins. Co.* v. *Dutton*, 419 So. 2d 1357 (1982), because there was an arguable reason for appellant's refusal to pay the claim.

The court's opinion was released on December 7, 1984; on December 21, 1984, appellant filed a timely application for rehearing. On February 14, 1985, before its application had been acted on, appellant learned that while the instant action was pending before the Alabama Supreme Court, Justice Embry, one of the five justices joining the *per curiam* opinion, had filed two actions in the Circuit Court for Jefferson County, Alabama, against insurance companies. Both of these actions alleged bad-faith failure to pay a claim. One suit arose out of Maryland Casualty Company's alleged failure to pay for the loss of a valuable mink coat; the other suit, which Justice Embry brought on behalf of himself and as a representative of a class of all other Alabama state employees insured under a group plan by Blue Cross-Blue Shield of Alabama (including, apparently, all justices of the Alabama Supreme Court), alleged a willful and intentional plan to withhold payment on valid claims. Both suits sought punitive damages.

On February 21, 1985, appellant filed two motions in the Alabama Supreme Court, challenging Justice Embry's participation in the court's December 7, 1984, decision and his continued participation in considering appellant's application for rehearing. The motion also alleged that all justices on the court should recuse themselves because of their interests as potential class members in Justice Embry's suit against Blue Cross. On March 8, 1985, the court unanimously denied the recusal motions. The brief order stated that each justice had voted individually on the matter of whether he should recuse himself and that each justice had voted not to do so. At the same time, by a 5-to-4 division, the court denied appellant's motion for rehearing.

Chief Justice Torbert wrote separately, explaining that although his views had not been influenced by his possible membership in the putative class alleged in Justice Embry's suit against Blue Cross, he was nonetheless notifying the Clerk of the court where that suit was pending not to permit him to be included in the alleged class. Justice Maddox also wrote separately, taking similar action.

On March 20, 1985, appellant obtained a copy of the transcript of Justice Embry's deposition, taken on January 10, 1985, in connection with his Blue Cross suit. The deposition revealed that Justice Embry had authored the *per curiam* opinion in this case over an 8- or 9-month period during which his civil action against Blue Cross was being prosecuted. Justice Embry also stated that, during that period, he had received "leads" from people with regard to his bad-faith action against Blue Cross and that he put them in touch with his attorney. Finally, Justice Embry revealed frustration with insurance companies. For example, when asked if he had ever had any difficulty with processing claims, Justice Embry retorted: "[T]hat is a silly question. For years and years."

Appellant moved for leave to file a second application for rehearing based on the deposition, but that motion was denied. Appellant filed an appeal with this Court, and JUSTICE POWELL, as Circuit Justice, granted appellant's application for a stay of the judgment below pending this Court's disposition of the appeal. Shortly thereafter, Justice Embry's suit against Blue Cross was settled by stipulation of the parties.[1] In the stipulation, Blue Cross recognized that "some problems have occurred in the past and is determined to minimize them in the future." Justice Embry received $30,000 under the settlement agreement on a basic compensatory claim of unspecified amount; a check for that sum was deposited by his attorney directly into Justice Embry's personal account.

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[1] Justice Embry's suit against Maryland Casualty Company had been settled sometime earlier by the payment of Justice Embry's claim.

We postponed consideration of the question of jurisdiction pending argument on the merits. 471 U. S. 1134 (1985). We now vacate and remand.

II

We are satisfied as to the Court's jurisdiction over the question of whether Justice Embry's participation violated appellant's Fourteenth Amendment due process rights. Appellees argue that the Alabama Supreme Court did not reach this issue because it was raised only after the court's decision on the merits. We reject that contention as at odds with the record. On March 8, 1985, the court entered the following order:

> "Upon consideration, the Court is of the opinion that under the allegation of said motion in this case each justice should vote individually on the matter of whether or not he or she is disqualified and should recuse. Each justice having voted not to recuse,
>
> "IT IS, THEREFORE, ORDERED that the 'Motion for Disqualification and Motion for Withdrawal of Opinion of December 7, 1984, and for Hearing De Novo' be . . . denied." App. to Juris. Statement 64a.

This order clearly demonstrates that the Alabama court reached the merits of appellant's constitutional challenge, albeit on a justice-by-justice basis. Moreover, appellant raised this issue as soon as it discovered the facts relating to Justice Embry's personal lawsuits. On this record, we conclude jurisdiction is proper. See *Ulster County Court* v.

Allen, 442 U. S. 140, 147–154 (1979); *Ward* v. *Village of Monroeville*, 409 U. S. 57, 61 (1972).

III

A

Appellant contends Justice Embry's general hostility towards insurance companies that were dilatory in paying claims, as expressed in his deposition, requires a conclusion that the Due Process Clause was violated by his participation in the disposition of this case. The Court has recognized that not "[a]ll questions of judicial qualification . . . involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion." *Tumey* v. *Ohio*, 273 U. S. 510, 523 (1927); see also *FTC* v. *Cement Institute*, 333 U. S. 683, 702 (1948) ("[M]ost matters relating to judicial disqualification [do] not rise to a constitutional level"). Moreover, the traditional common-law rule was that disqualification for bias or prejudice was not permitted. See, *e. g.*, *Clyma* v. *Kennedy*, 64 Conn. 310, 29 A. 539 (1894). See generally Frank, Disqualification of Judges, 56 Yale L. J. 605 (1947). As Blackstone put it, "the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea." 3 W. Blackstone, Commentaries *361. The more recent trend has been towards the adoption of statutes that permit disqualification for bias or prejudice. See *Berger* v. *United States*, 255 U. S. 22, 31 (1921) (enforcing statute disqualifying federal judges in certain circumstances for personal bias or prejudice). See also ABA Code of Judicial Conduct, Canon 3C(1)(a) (1980) ("A judge should disqualify himself . . . where he has a personal bias or prejudice concerning a party"). But that alone would not be sufficient basis for imposing a constitutional requirement under the Due Process Clause.

We held in *Patterson* v. *New York*, 432 U. S. 197, 201–202 (1977) (citations omitted), that

> "it is normally within the power of the State to regulate procedures under which its laws are carried out . . . and its decision in this regard is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

We need not decide whether allegations of bias or prejudice by a judge of the type we have here would ever be sufficient under the Due Process Clause to force recusal. Certainly only in the most extreme of cases would disqualification on this basis be constitutionally required, and appellant's arguments here fall well below that level. Appellant suggests that Justice Embry's general frustration with insurance companies reveals a disqualifying bias, but it is likely that many claimants have developed hostile feelings from the frustration in awaiting settlement of insurance claims. Insurers, on their side, have no easy task, especially when trying to evaluate whether certain medical diagnostic tests or prolonged hospitalization were indicated. In turn, the physicians and surgeons, whether impelled by valid medical judgment or by apprehension as to future malpractice claims—or some combination of the two—similarly face difficult problems. Appellant's allegations of bias and prejudice on this general basis, however, are insufficient to establish any constitutional violation.

B

The record in this case presents more than mere allegations of bias and prejudice, however. Appellant also presses a claim that Justice Embry had a more direct stake in the outcome of this case. In *Tumey*, while recognizing that the Constitution does not reach every issue of judicial qualification, the Court concluded that "it certainly violates the Fourteenth Amendment . . . to subject [a person's] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." 273 U. S., at 523.

More than 30 years ago Justice Black, speaking for the Court, reached a similar conclusion and recognized that under the Due Process Clause no judge "can be a judge in his own case [or be] permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U. S. 133, 136 (1955). He went on to acknowledge that what degree or kind of interest is sufficient to disqualify a judge from sitting "cannot be defined with precision." *Ibid.* Nonetheless, a reasonable formulation of the issue is whether the

> "situation is one 'which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'" *Ward* v. *Village of Monroeville*, *supra*, at 60.

Under these prior holdings, we examine just what factors might constitute such an interest in the outcome of this case that would bear on recusal. At the time Justice Embry cast the deciding vote and authored the court's opinion, he had pending at least one very similar bad-faith-refusal-to-pay lawsuit against Blue Cross in another Alabama court. The decisions of the court on which Justice Embry sat,[2] the Alabama Supreme Court, are binding on all Alabama courts. We need not blind ourselves to the fact that the law in the area of bad-faith-refusal-to-pay claims in Alabama, as in many other jurisdictions, was unsettled at that time, as the court's close division in deciding this case indicates. When Justice Embry cast the deciding vote, he did not merely apply well-established law and in fact quite possibly made new law; the court's opinion does not suggest that its conclusion was compelled by earlier decisions. Instead, to decide the case the court stated that "it is first necessary to review the policy considerations, elements, and instructive guide posts set out by this court in earlier case law." 470 So. 2d, at 1070. And in another case the court acknowledged that "the tort of bad faith refusal to pay a valid insurance claim is in the embryonic stage, and the Court has not had occasion to address every issue that might arise in these cases." *National Savings Life Ins. Co.* v. *Dutton,* 419 So. 2d, at 1362.

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[2] Justice Embry has since retired from the court for health reasons.

The decision under review firmly established that punitive damages could be obtained in Alabama in a situation where the insured's claim is not fully approved and only partial payment of the underlying claim had been made. Prior to the decision under review, the Alabama Supreme Court had not clearly recognized any claim for tortious injury in such circumstances; moreover, it had affirmatively recognized that partial payment was evidence of good faith on the part of the insurer. *Sexton* v. *Liberty National Life Ins. Co.*, 405 So. 2d 18, 22 (1981). The Alabama court also held that a bad-faith-refusal-to-pay cause of action will lie in Alabama even where the insured is not entitled to a directed verdict on the underlying claim, a conclusion that at the least clarified the thrust of an earlier holding. Cf. *National Savings Life Ins. Co.* v. *Dutton, supra,* at 1362. Finally, the court refused to set aside as excessive a punitive damages award of $3.5 million. The largest punitive award previously affirmed by that court was $100,000, a figure remitted from $1.1 million as "obviously the result of passion and prejudice on the part of the jury." *Gulf Atlantic Life Ins. Co.* v. *Barnes,* 405 So. 2d 916, 926 (1981).

All of these issues were present in Justice Embry's lawsuit against Blue Cross. His complaint sought recovery for partial payment of claims. Also the very nature of Justice Embry's suit placed in issue whether he would have to establish that he was entitled to a directed verdict on the underlying claims that he alleged Blue Cross refused to pay before gaining punitive damages. Finally, the affirmance of the largest punitive damages award ever (by a substantial margin) on precisely the type of claim raised in the Blue Cross suit undoubtedly "raised the stakes" for Blue Cross in that suit, to the benefit of Justice Embry. Thus, Justice Embry's opinion for the Alabama Supreme Court had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case.

We need not decide whether to characterize the decision under review as a change in Alabama law or a clarification of the contours of that law, a judgment we are obviously not called on to make. We hold simply that when Justice Embry made that judgment, he acted as "a judge in his own case." *Murchison*, *supra*, at 136.

We also hold that his interest was "'direct, personal, substantial, [and] pecuniary.'" *Ward*, *supra*, at 60 (quoting *Tumey* v. *Ohio*, 273 U. S., at 523). Justice Embry's complaint against Blue Cross sought "compensatory damage for breach of contract, inconvenience, emotional and mental distress, disappointment, pain and suffering" in addition to punitive damages for himself and for the class. Soon after the opinion of the Alabama Supreme Court in this case was announced, Blue Cross paid Justice Embry what he characterized in an interview as "a tidy sum," Reply Brief for Appellant 10, n. 8, to settle the suit. Records lodged with this Court show that Justice Embry received $30,000, which was deposited by his attorney directly into Justice Embry's personal account. To be sure, a portion of this money may have gone to Justice Embry's attorney in connection with the case, even though some materials before us suggest that his attorney agreed to waive his fee. Deposition of A. Grey Till in *Clay* v. *Nationwide Insurance Co.*, CV–78–1148 (Cir. Ct. of Mobile Cty., Ala.), pp. 27–29. We are also aware that Justice Embry obtained a statement in the settlement agreement to the effect that "[t]he primary object of the institution of this suit . . . was to emphasize to defendant Blue Cross . . . that claims under the Plan be processed and determined by Blue Cross in a timely and efficient manner," even though that type of relief was not sought specifically in the complaint while monetary relief was. We nonetheless hold that the "tidy sum" that Justice Embry received directly is sufficient to establish the substantiality of his interest here.

We conclude that Justice Embry's participation in this case violated appellant's due process rights as explicated in *Tumey*, *Murchison*, and *Ward.* We make clear that we are not required to decide whether in fact Justice Embry was influenced, but only whether sitting on the case then before the Supreme Court of Alabama "'would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'" *Ward*, 409 U. S., at 60 (quoting *Tumey* v. *Ohio*, *supra*, at 532). The Due Process Clause "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice.'" *Murchison*, 349 U. S., at 136 (citation omitted).

C

Appellant has challenged not only the participation of Justice Embry in this case but also the participation of all the other justices of the Alabama Supreme Court, or at least the six justices who did not withdraw from Justice Embry's class action against Blue Cross, claiming that they also have an interest in this case. Such allegations do not constitute a sufficient basis for requiring recusal under the Constitution. In the first place, accepting appellant's expansive contentions might require the disqualification of every judge in the State. If so, it is possible that under a "rule of necessity" none of the judges or justices would be disqualified. See *United States* v. *Will*, 449 U. S. 200, 214 (1980).

More important, while these justices might conceivably have had a slight pecuniary interest,[3] we find it impossible to characterize that interest as "'direct, personal, substantial, [and] pecuniary.'" *Ward, supra,* at 60 (quoting *Tumey, supra,* at 523). Appellant concedes that nothing in the record even suggests that these justices had any knowledge of the class action before the court issued a decision on the merits. Thus, at most only the decision to deny rehearing was even plausibly affected. Any interest that they might have had when they passed on the rehearing motion was clearly highly speculative and contingent. At the time, the trial court had not even certified a class, let alone awarded any class relief of a pecuniary nature. With the proliferation of class actions involving broadly defined classes, the application of the constitutional requirement of disqualification must be carefully limited. Otherwise constitutional disqualification arguments could quickly become a standard feature of class-action litigation. Cf. *In re City of Houston,* 745 F. 2d 925 (CA5 1984). At some point, "[t]he biasing influence . . . [will be] too remote and insubstantial to violate the constitutional constraints." *Marshall* v. *Jerrico, Inc.,* 446 U. S. 238, 243 (1980). Charges of disqualification should not be

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[3] The Court in *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U. S. 145 (1968), stated in dicta that "in *Tumey*[, 273 U. S., at 524,] the Court held that a decision should be set aside where there is 'the

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slightest pecuniary interest' on the part of the judge . . . ." *Id.,* at 148. We think this was a misreading of *Tumey.* The reference to "the slightest pecuniary interest" in that opinion came in a portion of the opinion describing "cases at common law in England prior to the separation of colonies from the mother country . . . ." 273 U. S., at 524. At a later point in the opinion, Chief Justice Taft quoted approvingly from the work of Justice Cooley, that disqualification is not worked in cases where the "'interest is so remote, trifling and insignificant that it may fairly be supposed to be incapable of affecting the judgment of or of influencing the conduct of an individual.'" *Id.,* at 531 (quoting T. Cooley, Constitutional Limitations 594 (7th ed. 1903)). Chief Justice Taft also reiterated that the case was not one "in which the penalties and the costs are negligible. . . . The court is a state agency, imposing substantial punishment . . . . It is not to be treated as a mere village tribunal for village peccadilloes." 273 U. S., at 532. We therefore follow *Ward* v. *Village of Monroeville,* 409 U. S. 57, 60 (1972), and decline to read *Tumey* as constitutionalizing any rule that a decision rendered by a judge with "the slightest pecuniary interest" constitutes a violation of the Due Process Clause.

made lightly. See *Rooker* v. *Fidelity Trust Co.*, 263 U. S. 413 (1923). We hold that there is no basis for concluding these justices were disqualified under the Due Process Clause.

D

Having concluded that only Justice Embry was disqualified from participation in this case, we turn to the issue of the proper remedy for this constitutional violation. Our prior decisions have not considered the question whether a decision of a multimember tribunal must be vacated because of the participation of one member who had an interest in the outcome of the case. Rather, our prior cases have involved interpretations of statutes with provisions concerning this question, *e. g.*, *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U. S. 145 (1968), disqualifications of the sole member of a tribunal, *e. g.*, *Ward* v. *Village of Monroeville*, *supra*, and disqualifications of an entire panel, *e. g.*, *Gibson* v. *Berryhill*, 411 U. S. 564 (1973). Some courts have concluded that a decision need not be vacated where a disqualified judge's vote is mere surplusage. See, *e. g.*, *State ex rel. Langer* v. *Kositzky*, 38 N. D. 616, 166 N. W. 534 (1918); but see, *e. g.*, *Oakley* v. *Aspinwall*, 3 N. Y. 547 (1850).[4] But we are aware of no case, and none has been called to our attention, permitting a court's decision to stand when a disqualified judge casts the deciding vote. Here Justice Embry's vote was decisive in the 5-to-4 decision[5] and he was the author of the court's opinion. Because of Justice Embry's leading role in the decision under review, we conclude that the "appearance of justice" will best be served by vacating the decision and remanding for further proceedings. Appellees have not contended that, upon a finding of disqualification, this disposition is improper.

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[4] We have confined the opinion to the issues presented by the parties and express no view on the question discussed by the justices who write separately. The issues here are far more complex than acknowledged by the concurrences, which, reasoning from hypothetical situations on matters not presented by the facts of this case, postulate a broad general rule. Traditionally the Court does not undertake to "'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring) (quoting *Liverpool, N. Y. & P. S. S. Co.* v. *Emigration Comm'rs*, 113 U. S. 33, 39 (1885)). Because the issue of disqualification of a single member of a multimember panel arises in a variety of factual contexts, see generally 48A C. J. S., Judges § 159, p. 868 (1981) (collecting cases), sound judicial practice wisely counsels judges to avoid unnecessary declarations on issues not presented, briefed, or argued.

III

We underscore that our decision today undertakes to answer only the question of under what circumstances the Constitution requires disqualification. The Due Process Clause demarks only the outer boundaries of judicial disqualifications. Congress and the states, of course, remain free to impose more rigorous standards for judicial disqualification than those we find mandated here today.

Appellant also argues that the retrospective imposition of punitive damages under a new cause of action violates its rights under the Contracts Clause of Article I, § 10; that a $3.5 million punitive damages award is impermissible under the Excessive Fines Clause of the Eighth Amendment; and that lack of sufficient standards governing punitive damages awards in Alabama violates the Due Process Clause of the Fourteenth Amendment. In addition, appellant contends that Ala. Code § 12-22-72 (1975), under which any person who unsuccessfully appeals a money judgment is assessed a 10% penalty, is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. These arguments raise important issues which, in an appropriate setting, must be resolved; however, our disposition of the recusal-for-bias issue makes it unnecessary to reach them.

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[5] If Justice Embry had disqualified himself, the decision of the trial court would not have been affirmed by a vote of an equally divided court. Rather, Ala. Code § 12-2-14 (1975), which authorizes the appointment of special justices in the event disqualifications result in an even-numbered court which is evenly divided on a matter, would presumably have come into play.

The judgment of the Supreme Court of Alabama is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

Vacated and remanded.

JUSTICE STEVENS took no part in the consideration or decision of this case.

JUSTICE BRENNAN, concurring.

I agree with the Court that, given Justice Embry's interest in the outcome of this case, his participation in its disposition violated due process. As the Court notes, resolution of the issues raised in the appeal below enhanced the viability and settlement value of Justice Embry's own lawsuit. Such an interest clearly required recusal under our decisions in *Tumey* v. *Ohio*, 273 U. S. 510 (1927); *In re Murchison*, 349 U. S. 133 (1955); *Ward* v. *Village of Monroeville*, 409 U. S. 57 (1972); and *Gibson* v. *Berryhill*, 411 U. S. 564 (1973). As Justice Black explained in *In re Murchison:*

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." 349 U. S., at 136.

I write separately to set forth my understanding of certain statements in the Court's opinion. *First*, the Court stresses that Justice Embry's interest was "'direct, personal, substantial, [and] pecuniary.'" *Ante*, at 824 (quoting *Ward*, *supra*, at 60); see also *ante*, at 826. I do not understand that by this language the Court states that only an interest that satisfies this test will taint the judge's participation as a due process violation. Nonpecuniary interests, for example, have been found to require recusal as a matter of due process. See, *e. g.*, *In re Murchison*, *supra* (judge who presided over a "one-man grand jury" also presided over contempt proceedings relating to events which took place in the grand jury proceedings). Moreover, as this case demonstrates, an interest is sufficiently "direct" if the outcome of the challenged proceeding substantially advances the judge's opportunity to attain some desired goal even if that goal is not actually attained in that proceeding. See, *e. g.*, *Ward* v. *Village of Monroeville*, *supra* (mayor's adjudication of traffic fines, which contributed to city finances, violated due process); *Gibson* v. *Berryhill*, *supra* (proceedings by Alabama Board of Optometry enjoined because Board members were competitors of petitioners and therefore stood to gain competitively). Nothing in the Court's opinion should be read, as I understand it, to limit these precedents in any way. Rather, the Court clearly indicates the contrary in acknowledging that the interests which trigger due process condemnation "'cannot be defined with precision.'" *Ante*, at 822 (quoting *In re Murchison*, *supra*, at 136).

Second, the Court points out that Justice Embry obtained a favorable settlement in his own lawsuit several months after the Alabama Supreme Court handed down its decision in this case. But even without that settlement, Justice Embry's participation in this case deprived appellant of due process. The deprivation occurred when Justice Embry took part in the deliberations and decision of the Alabama Supreme Court in this case. At most—and, again, I do not read the Court's opinion to say otherwise—the fact of the later settlement merely confirms that Justice Embry had a substantial interest in the outcome of this case.

Finally, I understand that the Court's opinion is not to be read to suggest that the outcome might be different had Justice Embry not provided the necessary fifth vote in the court below. That fact too is irrelevant—Justice Embry's participation in the court's resolution of the case, while he was fully aware of his interest in its outcome, was sufficient in itself to impugn the decision. The description of an opinion as being "for the court" connotes more than merely that the opinion has been joined by a majority of the participating judges. It reflects the fact that these judges have exchanged ideas and arguments in deciding the case. It reflects the collective process of deliberation which shapes the court's perceptions of which issues must be addressed and, more importantly, how they must be addressed. And, while the influence of any single participant in this process can never be measured with precision, experience teaches us that each member's involvement plays a part in shaping the court's ultimate disposition. The participation of a judge who has a substantial interest in the outcome of a case of which he knows at the time he participates *necessarily* imports a bias into the deliberative process. This deprives litigants of the assurance of impartiality that is the fundamental requirement of due process.

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL joins, concurring in the judgment.

I join the Court's judgment that Justice Embry's participation in this case denied appellant the impartial decisionmaker required by the Due Process Clause. I write separately, however, to stress that the constitutional violation in this case should not depend on the Court's apparent belief that Justice Embry cast the deciding vote—a factual assumption that may be incorrect and, to my mind, should be irrelevant to the Court's analysis. For me, Justice Embry's mere participation in the shared enterprise of appellate decisionmaking—whether or not he ultimately wrote, or even joined, the Alabama Supreme Court's opinion—posed an unacceptable danger of subtly distorting the decisionmaking process.

The Court states that a decision cannot be permitted to stand "when a disqualified judge casts the deciding vote. Here, Justice Embry's vote was decisive in the 5-to-4 decision and he was the author of the court's opinion." *Ante,* at 828. In a footnote, the Court elaborates on the decisiveness of Justice Embry's vote: had he disqualified himself, the decision of the trial court would not have been affirmed by an equally divided court because, under Alabama law, a special justice would have been appointed to break the tie. *Ante*, at 828, n. 5.

The record, however, casts doubt upon the Court's suggestion that Justice Embry provided the most crucial vote. Justice Embry's deposition testimony in the Blue Cross suit suggests that the initial vote of the Alabama Supreme Court was in fact to reverse the decision of the trial court in favor of the Lavoies. Accordingly, Justice Embry began work on a dissent. App. to Juris. Statement 168a–169a. After Justice Embry began writing, however, at least one justice switched his vote. Justice Embry's proposed dissent ultimately was issued as the *per curiam* opinion of the court. He explained: "It's customary a lot of times [to issue an opinion as a *per curiam*], if it's been assigned to you because the other opinion didn't prevail . . . ." *Id.*, at 167a.

We cannot know what led each justice on the Alabama Supreme Court to the position he or she reached in this case. But we do know, from our own experience on this nine-Member Court, that a forceful dissent may lead Justices to rethink their original positions and change their votes. And to suggest that the author of an opinion where the final vote is 5 to 4 somehow plays a peculiarly decisive "leading role," *ante*, at 828, ignores the possibility of a case where the author's powers of persuasion produce an even larger margin of votes. It makes little sense to intimate that if Justice Embry's dissent had led two colleagues to switch their votes, and the final vote had been 6 to 3, Aetna would somehow not have been injured by his participation.

More importantly, even if Justice Embry had not written the court's opinion, his participation in the case would have violated the Due Process Clause. Our experience should tell us that the concessions extracted as the price of joining an opinion may influence its shape as decisively as the sentiments of its nominal author. To discern a constitutionally significant difference between the author of an opinion and the other judges who participated in a case ignores the possibility that the collegial decisionmaking process that is the hallmark of multimember courts led the author to alter the tone and actual holding of the opinion to reach a majority, or to attain unanimity. And because this collegial exchange of ideas occurs in private, a reviewing court may never discover the actual effect a biased judge had on the outcome of a particular case. We should not attempt the perhaps futile task of distilling Justice Embry's particular contribution to determine whether the result would have been the same had he disqualified himself at the outset. I would not want other appellate courts to read the Court's opinion today to suggest that such an inquiry provides an appropriate guarantee of due process.

The violation of the Due Process Clause occurred when Justice Embry sat on this case, for it was then the danger arose that his vote and his views, potentially tainted by his interest in the pending Blue Cross suit, would influence the votes and views of his colleagues. The remaining events—that another justice switched his vote and that Justice Embry wrote the court's opinion—illustrate, but do not create, the constitutional infirmity that requires us to vacate the judgment of the Alabama Supreme Court.

UNITED STATES *v.* AMERICAN COLLEGE OF PHYSICIANS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 84-1737. Argued January 21, 1986—Decided April 22, 1986

Section 511(a)(1) of the Internal Revenue Code imposes a tax on the "unrelated business taxable income" of tax-exempt organizations. Section 512(a)(1) defines "unrelated business taxable income" as the gross income derived by such an organization from any "unrelated trade or business . . . regularly carried on by it," and § 513(a) defines "unrelated trade or business" as "any trade or business the conduct of which is not substantially related" to the organization's tax-exempt purposes. Respondent tax-exempt organization, in furtherance of its exempt purposes of maintaining high standards in medical education and practice, encouraging research, and fostering measures for preventing disease and improving public health, publishes a monthly medical journal containing articles relevant to the practice of internal medicine. Each issue of the journal contains paid advertisements for pharmaceuticals, and medical supplies and equipment useful in the practice of internal medicine. After respondent had paid taxes on its net income from such advertisements in 1975, it filed a claim for a refund, and when the Government demurred, ultimately filed suit in the United States Claims Court, which held that the advertisements were not substantially related to respondent's tax-exempt purposes and that therefore the advertising proceeds were taxable. The Court of Appeals reversed. Taking the view that the Claims Court had focused too much on the commercial character of the advertising business and not enough on the advertisements' contribution to the education of the medical journal's readers, the Court of Appeals held that respondent had established the requisite substantial relation and its entitlement to exemption from taxation.

Held: Respondent must pay a tax on the profits it earns from the advertisements. Pp. 837-850.

(a) It is undisputed that respondent's publication of paid advertising is a "trade or business" and that the business is "regularly carried on." Pp. 839-841.

(b) There is no merit to the Government's argument that Congress and the Treasury intended to establish a blanket rule requiring the taxation of income from all commercial advertising by tax-exempt professional journals without a specific analysis of the circumstances.

There is no support for such a rule in the regulations or in the legislative history of the Internal Revenue Code. Pp. 841–847.

(c) In this case, however, based on the Claims Court's finding of facts that are adequately supported by the record, and considering those facts in light of the applicable legal standard, it must be concluded that the advertisements in question were not "substantially related," or in the words of the implementing regulation did not "contribute importantly," to the medical journal's educational purposes. The Claims Court properly directed its attention to respondent's conduct of its advertising business, whereas the Court of Appeals erroneously focused exclusively upon the information conveyed by commercial advertising and consequently failed to give effect to the governing statute and regulations. Pp. 847–850.

743 F. 2d 1570, reversed.

MARSHALL, J., delivered the opinion for a unanimous Court. BURGER, C. J., filed a concurring opinion, in which POWELL, J., joined, *post*, p. 850.

Albert G. Lauber, Jr., argued the cause for the United States. With him on the briefs were *Solicitor General Fried*, *Assistant Attorney General Archer*, *Robert A. Bernstein*, and *Robert S. Pomerance*.

John B. Huffaker argued the cause for respondent. With him on the brief were *Eleanor N. Ewing* and *Gerald P. Norton.**

JUSTICE MARSHALL delivered the opinion of the Court.

A tax-exempt organization must pay tax on income that it earns by carrying on a business not "substantially related" to the purposes for which the organization has received its exemption from federal taxation. The question before this Court is whether respondent, a tax-exempt organization,

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**Robert A. Saltzstein* and *Joseph J. Saunders* filed a brief for American Business Press as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Association for the Advancement of Science by *John D. Lane;* for the American Medical Association et al. by *George A. Platz*, *Frank V. Battle, Jr.*, *J. Timothy Kleespies*, and *Kathleen R. Curtis;* and for the American Society of Association Executives by *George D. Webster* and *Frank M. Northam.*

must pay tax on the profits it earns by selling commercial advertising space in its professional journal, The Annals of Internal Medicine.

I

Respondent, the American College of Physicians, is an organization exempt from taxation under § 501(c)(3) of the Internal Revenue Code.[1] The purposes of the College, as stated in its articles of incorporation, are to maintain high standards in medical education and medical practice; to encourage research, especially in clinical medicine; and to foster measures for the prevention of disease and for the improvement of public health. App. 16a. The principal facts were stipulated at trial. In furtherance of its exempt purposes, respondent publishes The Annals of Internal Medicine (Annals), a highly regarded monthly medical journal containing scholarly articles relevant to the practice of internal medicine. Each issue of Annals contains advertisements for pharmaceuticals, medical supplies, and equipment useful in the practice of internal medicine, as well as notices of positions available in that field. Respondent has a longstanding policy of accepting only advertisements containing information about the use of medical products, and screens proffered advertisements for accuracy and relevance to internal medicine. The advertisements are clustered in two groups, one at the front and one at the back of each issue.

In 1975, Annals produced gross advertising income of $1,376,322. After expenses and deductible losses were subtracted, there remained a net income of $153,388. Respondent reported this figure as taxable income and paid taxes on it in the amount of $55,965. Respondent then filed a timely claim with the Internal Revenue Service for refund of these taxes, and when the Government demurred, filed suit in the United States Claims Court.

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[1] Title 26 U. S. C. § 501(c)(3) exempts from taxation entities "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes," with certain restrictions on their activities, including prohibition of political activity.

The Claims Court held a trial and concluded that the advertisements in Annals were not substantially related to respondent's tax-exempt purposes. 3 Cl. Ct. 531 (1983). Rather, after finding various facts regarding the nature of the College's advertising business, it concluded that any correlation between the advertisements and respondent's educational purpose was incidental because "the comprehensiveness and content of the advertising package is entirely dependent on each manufacturer's willingness to pay for space and the imagination of its advertising agency." *Id.*, at 535. Accordingly, the court determined that the advertising proceeds were taxable.

The Court of Appeals for the Federal Circuit reversed. 743 F. 2d 1570 (1984). It held clearly erroneous the trial court's finding that the advertising was not substantially related to respondent's tax-exempt purpose. The Court of Appeals believed that the trial court had focused too much on the commercial character of the advertising business and not enough on the actual contribution of the advertisements to the education of the journal's readers. It held that respondent had established the requisite substantial relation and its entitlement to exemption from taxation. *Id.*, at 1578. We granted the Government's petition for certiorari, 473 U. S. 904 (1985), and now reverse.

II

The taxation of business income not "substantially related" to the objectives of exempt organizations dates from the Revenue Act of 1950, Ch. 994, 64 Stat. 906 (1950 Act). The statute was enacted in response to perceived abuses of the tax laws by tax-exempt organizations that engaged in profitmaking activities. Prior law had required only that the profits garnered by exempt organizations be used in furtherance of tax-exempt purposes, without regard to the source of those profits. See *Trinidad* v. *Sagrada Orden de Predicadores,* 263 U. S. 578, 581 (1924); *C. F. Mueller Co.* v. *Commissioner,* 190 F. 2d 120 (CA3 1951); *Roche's Beach, Inc.* v. *Commissioner,* 96 F. 2d 776 (CA2 1938). As a result, tax-exempt organizations were able to carry on full-fledged commercial enterprises in competition with corporations whose profits were fully taxable. See Revenue Revision of 1950: Hearings before the House Committee on Ways and Means, Vol. I, 81st Cong., 2d Sess., 18–19 (1950) (hereinafter cited as 1950 House Hearings) (describing universities' production of "automobile parts, chinaware, and food products, and the operation of theatres, oil wells, and cotton gins"). Congress perceived a need to restrain the unfair competition fostered by the tax laws. See H. R. Rep. No. 2319, 81st Cong., 2d Sess., 36–37 (1950).

Nevertheless, Congress did not force exempt organizations to abandon all commercial ventures, nor did it levy a tax only upon businesses that bore no relation at all to the tax-exempt purposes of an organization, as some of the 1950 Act's proponents had suggested. See, *e. g.,* 1950 House Hearings, at 4, 19, 165. Rather, in the 1950 Act it struck a balance between its two objectives of encouraging benevolent enterprise and restraining unfair competition by imposing a tax on the "unrelated business taxable income" of tax-exempt organizations. 26 U. S. C. § 511(a)(1).

"Unrelated business taxable income" was defined as "the gross income derived by any organization from any unrelated trade or business . . . regularly carried on by it . . . ." § 512(a)(1). Congress defined an "unrelated trade or business" as "any trade or business the conduct of which is not substantially related . . . to the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption . . . ." § 513(a). Whether respondent's advertising income is taxable, therefore, depends upon (1) whether the publication of paid advertising is a "trade or business," (2) whether it is regularly carried on, and (3) whether it is substantially related to respondent's tax-exempt purposes.

III

A

Satisfaction of the first condition is conceded in this case, as it must be, because Congress has declared unambiguously that the publication of paid advertising is a trade or business activity distinct from the publication of accompanying educational articles and editorial comment.

In 1967, the Treasury promulgated a regulation interpreting the unrelated business income provision of the 1950 Act. The regulation defined "trade or business" to include not only a complete business enterprise, but also any component activity of a business. Treas. Reg. § 1.513–1(b), 26 CFR § 1.513–1(b) (1985) (first published at 32 Fed. Reg. 17657 (1967)).[2] This revolutionary approach to the identification of a "trade or business" had a significant effect on advertising, which theretofore had been considered simply a part of a unified publishing business. The new regulation segregated the "trade or business" of selling advertising space from the "trade or business" of publishing a journal, an approach commonly referred to as "fragmenting" the enterprise of publishing into its component parts:

> "[A]ctivities of soliciting, selling, and publishing commercial advertising do not lose identity as a trade or business even though the advertising is published in an exempt organization periodical which contains editorial matter related to the exempt purposes of the organization." 26 CFR § 1.513–1(b) (1985).

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[2] The 1967 Treasury regulations at issue in this case, published in final form at 32 Fed. Reg. 17657 (1967), have not been amended in pertinent part since their promulgation, and references to those regulations herein are to the current version.

In 1969, Congress responded to widespread criticism of those Treasury regulations[3] by passing the Tax Reform Act of 1969, Pub. L. 91–172, 83 Stat. 487 (1969 Act). That legislation specifically endorsed the Treasury's concept of "fragmenting" the publishing enterprise into its component activities, and adopted, in a new § 513(c), much of the language of the regulation that defined advertising as a separate trade or business:

> "Advertising, etc., activities . . . an activity does not lose identity as a trade or business merely because it is carried on . . . within a larger complex of other endeavors which may, or may not, be related to the exempt purposes of the organization." 26 U. S. C. § 513(c).

The statute clearly established advertising as a trade or business, the first prong of the inquiry into the taxation of unrelated business income.

The presence of the second condition, that the business be regularly carried on, is also undisputed here. The satisfaction of the third condition, however, that of "substantial relation," is vigorously contested, and that issue forms the crux of the controversy before us.

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[3] See, *e. g.*, Moore, Current Problems of Exempt Organizations, 24 Tax L. Rev. 469, 476 (1969); Middleditch & Webster, The new unrelated business income Regs: what they mean; how to cope with them, 28 J. Tax. 174, 178 (1968); Webster, New proposals change definition of unrelated business income, 27 J. Tax. 42, 43 (1967); Weithorn & Liles, Unrelated Business Income Tax: Changes Affecting Journal Advertising Revenues, 45 Taxes 791, 798 (1967). See also Tax Reform, 1969: Hearings before the House Committee on Ways and Means, 91st Cong., 1st Sess., 1129, 1184, 1223 (1969). Numerous bills were introduced in the 90th Congress, 1st Session, in an unsuccessful attempt to overturn the regulations, even before they became final. See, *e. g.*, H. R. 8765; H. R. 8766; H. R. 9103; H. R. 9468; H. R. 9661; H. R. 9763; H. R. 10150; H. R. 10997; H. R. 10998; H. R. 11491; H. R. 11492. And several years later, two federal courts struck down the 1967 regulations as exceeding pre-1969 statutory authority, insofar as they required the "fragmentation" of publishing activities. See *American College of Physicians* v. *United States*, 209 Ct. Cl. 23, 29, 530 F. 2d 930, 933 (1976); *Massachusetts Medical Society* v. *United States*, 514 F. 2d 153, 154 (CA1 1975).

B

According to the Government, Congress and the Treasury established a blanket rule that advertising published by tax-exempt professional journals can never be substantially related to the purposes of those journals and is, therefore, always a taxable business. Respondent, however, contends that each case must be determined on the basis of the characteristics of the advertisements and journal in question. Each party finds support for its position in the governing statute and regulations issued by the Department of the Treasury.

In its 1967 regulations, the Treasury not only addressed the "fragmentation" issue discussed above, but also attempted to clarify the statutory "substantially related" standard found in § 513(a). It provided that the conduct of a tax-exempt business must have a causal relation to the organization's exempt purpose (other than through the generation of income), and that "the production or distribution of the goods or the performance of the services from which the gross income is derived must *contribute importantly* to the accomplishment of [the exempt] purposes." Treas. Reg. § 1.513–1(d)(2), 26 CFR § 1.513–1(d)(2) (1985) (emphasis added). In illustration of its new test for substantial relation, the Treasury provided an example whose interpretation is central to the resolution of the issue before us. Example 7 of Treas. Reg. § 1.513–1(d)(4)(iv) involves "Z," an exempt association formed to advance the interests of a particular profession and drawing its membership from that profession. Z publishes a monthly journal containing articles and other editorial material that contribute importantly to the tax-exempt purpose. Z derives income from advertising products within the field of professional interest of the members:

> "Following a practice common among taxable magazines which publish advertising, Z requires its advertising to comply with certain general standards of taste, fairness, and accuracy; but within those limits the form, content, and manner of presentation of the advertising messages are governed by the basic objective of the advertisers to promote the sale of the advertised products. While the advertisements contain certain information, the informational function of the advertising is incidental to the controlling aim of stimulating demand for the advertised products and differs in no essential respect from the informational function of any commercial advertising. Like taxable publishers of advertising, Z accepts advertising only from those who are willing to pay its published rates. Although continuing education of its members in matters pertaining to their profession is one of the purposes for which Z is granted exemption, the publication of advertising designed and selected in the manner of ordinary commercial advertising is not an educational activity of the kind contemplated by the exemption statute; it differs fundamentally from such an activity both in its governing objective and in its method. Accordingly, Z's publication of advertising does not contribute importantly to the accomplishment of its exempt purposes; and the income which it derives from advertising constitutes gross income from unrelated trade or business." § 1.513-1(d)(4)(iv), Example 7.

The Government contends both that Example 7 creates a *per se* rule of taxation for journal advertising income and that Congress intended to adopt that rule, together with the remainder of the 1967 regulations, into law in the 1969 Act. We find both of these contentions unpersuasive.

Read as a whole, the regulations do not appear to create the type of blanket rule of taxability that the Government urges upon us. On the contrary, the regulations specifically condition tax exemption of business income upon the importance of the business activity's contribution to the particular exempt purpose at issue, and direct that "[w]hether activities productive of gross income contribute importantly to the accomplishment of any purpose for which an organization is granted an exemption depends *in each case* upon the facts and circumstances involved," § 1.513–1(d)(2) (emphasis added). Example 7 need not be interpreted as being inconsistent with that general rule. Attributing to the term "example" its ordinary meaning, we believe that Example 7 is best construed as an illustration of one possible application, under given circumstances, of the regulatory standard for determining substantial relation.

The interpretative difficulty of Example 7 arises primarily from its failure to distinguish clearly between the statements intended to provide hypothetical facts and those designed to posit the necessary legal consequences of those facts. Just at the point in the lengthy Example at which the facts would appear to end and the analysis to begin, a pivotal statement appears: "the informational function of the advertising is incidental to the controlling aim of stimulating demand for the advertised products." The Government's position depends upon reading this statement as a general proposition of law, while respondent would read it as a statement of fact that may be true by hypothesis of "Z" and its journal, but is not true of Annals.

We recognize that the language of the Example is amenable to either interpretation. Nevertheless, several considerations lead us to believe that the Treasury did not intend to set out a *per se* statement of law. First, when the regulations were proposed in early 1967, the Treasury expressed a clear intention to treat all commercial advertising as an unrelated business. See Technical Information Release No. 889, CCH 1967 Stand. Fed. Tax Rep. ¶ 6557. When the regulations were issued in final form, however, following much criticism and the addition of Example 7, they included no such statement of intention. 32 Fed. Reg. 17657 (1967). Second, a blanket rule of taxation for advertising in professional journals would contradict the explicit case-by-case requirement articulated in Treas. Reg. § 1.513–1(d)(2), and we are reluctant to attribute to the Treasury an intention to depart from its own general principle in the absence of clear support for doing so. Finally, at the time the regulations were issued, the 1950 Act had been interpreted to mean that business activities customarily engaged in by tax-exempt organizations would continue to be considered "substantially related" and untaxed. See Note, The Macaroni Monopoly: The Developing Concept of Unrelated Business Income of Exempt Organizations, 81 Harv. L. Rev. 1280, 1291 (1968). A *per se* rule of taxation for the activity, traditional among tax-exempt journals, of carrying commercial advertising would have been a significant departure from that prevailing view. Thus, in 1967 the idea of a *per se* rule of taxation for all journal advertising revenue was sufficiently controversial, its effect so substantial, and its statutory authorization so tenuous, that we simply cannot attribute to the Treasury the intent to take that step in the form of an ambiguous example, appended to a subpart of a subsection of a subparagraph of a regulation.

It is still possible, of course, that, regardless of what the Treasury actually meant by its 1967 regulations, Congress read those regulations as creating a blanket rule of taxation, and intended to adopt that rule into law in the 1969 Act. The Government appears to embrace this view, which it supports with certain statements in the legislative history of the 1969 Act. For example, the Government cites to a statement in the House Report, discussing the taxation of advertising income of journals published by tax-exempt organizations:

> "Your committee believes that a business competing with taxpaying organizations should not be granted an unfair competitive advantage by operating tax free unless the business contributes importantly to the exempt function. It has concluded that by that standard, ad-

> vertising in a journal published by an exempt organization is not related to the organization's exempt functions, and therefore it believes that this income should be taxed." H. R. Rep. No. 91–413, pt. 1, p. 50 (1969).

Similar views appear in the Senate Report:

> "Present law.—In December 1967, the Treasury Department promulgated regulations under which the income from advertising and similar activities is treated as 'unrelated business income' even though such advertising for example may appear in a periodical related to the educational or other exempt purpose of the organization.
>
> "General reasons for change.—The committee agrees with the House that the regulations reached an appropriate result in specifying that when an exempt organization carries on an advertising business in competition with other taxpaying advertising businesses, it should pay a tax on the advertising income. The statutory language on which the regulations are based, however, is sufficiently unclear so that substantial litigation could result from these regulations. For this reason, the committee agrees with the House that the regulations, insofar as they apply to advertising and related activities, should be placed in the tax laws." S. Rep. No. 91–552, p. 75 (1969).

Based on this language, the Government argues that the 1969 Act created a *per se* rule of taxation for advertising income. The weakness of this otherwise persuasive argument, however, is that the quoted discussion appears in the Reports solely in support of the legislators' decision to enact § 513(c), the provision approving the fragmentation of "trade or business." Although § 513(c) was a significant change in the tax law that removed one barrier to the taxation of advertising proceeds, it cannot be construed as a comment upon the two other distinct conditions—"regularly carried on" and "not substantially related"—whose satisfaction is prerequisite to taxation of business income under the 1950 Act. Congress did not incorporate into the 1969 Act the language of the regulation defining "substantial relation," nor did the statute refer in any other way to the issue of the relation between advertising and exempt functions, even though that issue had been hotly debated at the hearings. See, *e. g.*, Tax Reform, 1969: Hearings before the House Committee on Ways and Means, 91st Cong., 1st Sess., 1113, 1118, 1192, 1241 (1969). Thus, we have no reason to conclude from the Committee Reports that Congress resolved the dispute whether, in a specific case, a journal's carriage of advertising could so advance its educational objectives as to be "substantially related" to those objectives within the meaning of the 1950 Act.

It is possible that the Committees' discussion of advertising reflects merely an erroneous assumption that the "fragmentation" provision of § 513(c), without more, would establish the automatic taxation of journal advertising revenue. Alternatively, the quoted passages could be read to indicate the Committees' intention affirmatively to endorse what they believed to be existing practice, or even to change the law substantially. The truth is that, other than a general reluctance to consider commercial advertisements generally as substantially related to the purposes of tax-exempt journals, no congressional view of the issue emerges from the quoted excerpts of the Reports.[4] Thus, despite the Reports' seeming endorsement of a *per se* rule, we are hesitant to rely on that inconclusive legislative history either to supply a provision *not* enacted by Congress, see *Commissioner* v. *Acker*,

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[4] Indeed, different excerpts suggest that perhaps the House Committee did not construe the statute as creating a *per se* rule. In its explanation of § 513(c), the House Report states that "the advertising contained in a publication of an exempt organization *may* be subject to the tax under section 511 even though the editorial content of the publication may be related to the exempt purposes of the organization." H. R. Rep. No. 91–413, pt. 2, p. 26 (1969) (emphasis added).

361 U. S. 87, 93 (1959); 1 J. Mertens, Law of Federal Income Taxation § 3.29 (Weinstein rev. 1985), or to define a statutory term enacted by a prior Congress. See *SEC* v. *Sloan*, 436 U. S. 103, 121 (1978); *United States* v. *Price*, 361 U. S. 304, 313 (1960). Cf. *TVA* v. *Hill*, 437 U. S. 153, 193 (1978). We agree, therefore, with both the Claims Court and the Court of Appeals in their tacit rejection of the Government's argument that the Treasury and Congress intended to establish a *per se* rule requiring the taxation of income from all commercial advertisements of all tax-exempt journals without a specific analysis of the circumstances.[5]

IV

It remains to be determined whether, in this case, the business of selling advertising space is "substantially related"—or, in the words of the regulation, "contributes importantly"—to the purposes for which respondent enjoys an exemption from federal taxation. Respondent has maintained throughout this litigation that the advertising in Annals performs an educational function supplemental to that of the journal's editorial content. App. 7a. Testimony of respondent's witnesses at trial tended to show that drug advertising performs a valuable function for doctors by disseminating information on recent developments in drug manufacture and use. *Id.*, at 27a, 38a, 43a. In addition, respondent has contended that the role played by the Food and Drug Administration, in regulating much of the form and content of prescription-drug advertisements, enhances the contribution that such advertisements make to the readers' education. All of these factors, respondent argues, distinguish the advertising in Annals from standard commercial advertising. Respondent approaches the question of substantial relation from the perspective of the journal's subscribers; it points to the benefit that they may glean from reading the advertisements and concludes that that benefit is substantial enough to satisfy the statutory test for tax exemption. The Court of Appeals took the same approach. It concluded that the advertisements performed various "essential" functions for physicians, 743 F. 2d, at 1576, and found a substantial relation based entirely upon the medically related content of the advertisements as a group.

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[5] This conclusion is consistent with the Treasury's own approach to analogous problems. See, *e. g.*, Rev. Rul. 82–139, 1982–2 Cum. Bull. 108 (advertisements in county bar journal; no *per se* rule); Rev. Rul. 72–431, 1972–2 Cum. Bull. 281 (exempt organization's sale of mailing lists to commercial advertisers; no *per se* rule). Our rejection of the *per se* rule renders it unnecessary for us to address respondent's alternative argument that any such rule should apply only to associations organized under § 501(c)(6) of the Internal Revenue Code.

The Government, on the other hand, looks to the conduct of the tax-exempt organization itself, inquiring whether the publishers of Annals have performed the advertising services in a manner that evinces an intention to use the advertisements for the purpose of contributing to the educational value of the journal. Also approaching the question from the vantage point of the College, the Claims Court emphasized the lack of a comprehensive presentation of the material contained in the advertisements. It commented upon the "hit-or-miss nature of the advertising," 3 Cl. Ct., at 543, n. 3, and observed that the "differences between ads plainly reflected the advertiser's marketing strategy rather than their probable importance to the reader." *Id.*, at 534. "[A]ny educational function [the advertising] may have served was incidental to its purpose of raising revenue." *Id.*, at 535.

We believe that the Claims Court was correct to concentrate its scrutiny upon the conduct of the College rather than upon the educational quality of the advertisements. For all advertisements contain some information, and if a modicum of informative content were enough to supply the important contribution necessary to achieve tax exemption for commercial advertising, it would be the rare advertisement indeed that would fail to meet the test. Yet the statutory and regulatory scheme, even if not creating a *per se* rule *against* tax exemption, is clearly antagonistic to the concept of a *per se* rule *for* exemption for advertising revenue. Moreover, the statute provides that a tax will be imposed on "any trade or business the *conduct* of which is not substantially related," 26 U. S. C. § 513(a) (emphasis added), directing our focus to the manner in which the tax-exempt organization operates its business. The implication of the statute is confirmed by the regulations, which emphasize the "manner" of designing and selecting the advertisements. See Treas. Reg. § 1.513–1(d)(4)(iv), Example 7, 26 CFR § 1.513–1(d)(4)(iv), Example 7 (1985). Thus, the Claims Court properly directed its attention to the College's conduct of its advertising business, and it found the following pertinent facts:

> "The evidence is clear that plaintiff did not use the advertising to provide its readers a comprehensive or systematic presentation of any aspect of the goods or services publicized. Those companies willing to pay for advertising space got it; others did not. Moreover, some of the advertising was for established drugs or devices and was repeated from one month to another, undermining the suggestion that the advertising was principally designed to alert readers of recent developments [citing, as examples, ads for Valium, Insulin and Maalox]. Some ads even concerned matters that had no conceivable relationship to the College's tax-exempt purposes." 3 Cl. Ct., at 534 (footnotes omitted).

These facts find adequate support in the record. See, *e. g.*, App. 29a–30a, 59a. Considering them in light of the applicable legal standard, we are bound to conclude that the advertising in Annals does not contribute importantly to the journal's educational purposes. This is not to say that the College could not control its publication of advertisements in such a way as to reflect an intention to contribute importantly to its educational functions. By coordinating the content of the advertisements with the editorial content of the issue, or by publishing only advertisements reflecting new developments in the pharmaceutical market, for example, perhaps the College could satisfy the stringent standards erected by Congress and the Treasury. In this case, however, we have concluded that the Court of Appeals erroneously focused exclusively upon the information that is invariably conveyed by commercial advertising, and consequently failed to give effect to the governing statute and regulations. Its judgment, accordingly, is

Reversed.

CHIEF JUSTICE BURGER, with whom JUSTICE POWELL joins, concurring.

Most medical journals are not comparable to magazines and newspapers published for profit. Their purpose is to assemble and disseminate to the profession relevant information bearing on patient care. The enormous expansion of medical knowledge makes it difficult for a general practitioner—or even a specialist—to keep fully current with the latest developments without such aids. In a sense these journals provide continuing education for physicians—a "correspondence course" not sponsored for profit but public health.

There is a public value in the widest possible circulation of such data, and advertising surely tends to reduce the cost of publication and hence the cost to each subscriber, thereby enhancing the prospect of wider circulation. Plainly a regulation recognizing these realities would be appropriate. Such regulations, of course, are for the Executive Branch and the Congress, not the courts. I join the opinion because it reflects a permissible reading of the present Treasury regulations.

SORENSON *v.* SECRETARY OF THE TREASURY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84-1686. Argued January 15, 1986—Decided April 22, 1986

The Internal Revenue Code (IRC) allows an individual responsible for the support of a child living with him a credit against income taxes due equal to a certain percentage of so much of earned income as does not exceed a specified amount. If the credit exceeds tax liability, the excess is considered "an overpayment" of tax under IRC § 6401(b). Section 6402(a) provides for a refund of "any overpayment" to the person who made it. Section 6402(c) requires the amount of "any overpayment" to be reduced by the amount of any past-due child-support payments assigned to a State. Section 464 of the Social Security Act (SSA) directs the Secretary of the Treasury to "intercept" tax refunds payable to persons who have failed to meet child-support obligations that have been assigned to a State. When petitioner's husband fell behind in support payments for a child of a previous marriage who was in the custody of his former wife, the latter, upon applying for welfare benefits from the State of Washington, assigned to the State, as required by the Aid to Families with Dependent Children program, her right to collect the unpaid child-support payments. Petitioner and her husband, who had their own dependent child living with them, filed a joint federal income tax return for 1981 in which all income was attributable to petitioner's wages and unemployment compensation benefits and in which they anticipated a refund based in part on an earned-income credit. The Internal Revenue Service, however, notified them that a certain amount of the anticipated refund was being retained, under the authority of the tax-intercept law, and would be paid over to the State of Washington. Petitioner then filed a class action in Federal District Court, seeking a declaration that § 464 of the SSA did not reach a refund attributable to an excess earned-income credit. The District Court granted summary judgment for the Government, and the Court of Appeals affirmed.

Held: An excess earned-income credit can properly be intercepted under the applicable statutes. Pp. 859-865.

(a) The IRC's treatment of earned-income credits supports the Government's position. The refundability of that credit is inseparable from its classification as an overpayment of tax. It is an "overpayment" not only for purposes of § 6402(a), but also for purposes of § 6402(c). Eligibility for an earned-income credit does not depend upon an individual's actually having paid any tax. The IRC's classification of the credit as an "overpayment" to be refunded is similarly independent of the individual's actually having made any payment. To the extent an excess credit is "payable" to an individual, it is payable as if it were a refund of tax paid. Pp. 859–863.

(b) There is no support for petitioner's claim that Congress did not intend the tax-intercept program to reach excess earned-income credits. Although Congress never mentioned the earned-income credit in enacting the Omnibus Budget Reconciliation Act of 1981, which added § 6402(c) to the IRC, it must have been aware, when it provided in § 6402(c) that "*any* overpayment" to be refunded shall be reduced by the amount of any past-due child support, that this would include refunds attributable to excess earned-income credits. And, although the goals of the earned-income credit—to reduce the disincentive to work caused by Social Security taxes on earned income, to stimulate the economy by funneling funds to persons likely to spend the money immediately, and to provide for relief for low-income families hurt by rising food and energy prices—are important, it cannot be said that Congress concluded that they outweigh the goals served by the subsequently enacted tax-intercept program—securing child support from absent parents and reducing the number of families on welfare. Pp. 863–865.

752 F. 2d 1433, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 866.

Peter Greenfield argued the cause for petitioner. With him on the briefs was *J. Bruce Smith.*

Richard Farber argued the cause for respondents. With him on the brief were *Solicitor General Fried, Assistant Attorney General Archer, Albert G. Lauber, Jr., Michael L. Paup,* and *Steven I. Frahm.**

JUSTICE BLACKMUN delivered the opinion of the Court.

The Internal Revenue Code and the Social Security Act direct the Secretary of the Treasury to "intercept" certain tax refunds payable to persons who have failed to meet child-support obligations. In this case, the United States Court of Appeals for the Ninth Circuit ruled that payments involving earned-income credits could be intercepted. 752 F. 2d 1433 (1985). We granted certiorari, 472 U. S. 1016 (1985), because this ruling was in conflict with decisions of the Courts of Appeals for the Second and Tenth Circuits. See *Rucker* v. *Secretary of Treasury*, 751 F. 2d 351 (CA10 1984); *Nelson* v. *Regan*, 731 F. 2d 105 (CA2), cert. denied *sub nom. Manning* v. *Nelson*, 469 U. S. 853 (1984).

**Joseph I. Lieberman,* Attorney General of Connecticut, and *Joseph X. Dumond, Jr.,* Assistant Attorney General, filed a brief for the State of Connecticut as *amicus curiae* urging affirmance.

I

A

Stanley Sorenson, the husband of petitioner Marie Sorenson, was legally obligated to make child-support payments for a child of his previous marriage who was in the custody of his former wife. Mr. Sorenson was unemployed because of a disability and fell behind on those support payments. His former wife applied for welfare benefits from the State of Washington. Since 1975, the program for Aid to Families with Dependent Children (AFDC) has required, as a condition of eligibility, that applicants for welfare assign to the State concerned any right to child-support payments that has accrued at the time of assignment. Pub. L. 93–647, § 101(c)(5)(C), 88 Stat. 2359, 42 U. S. C. § 602(a)(26)(A).[1] Thus, Stanley Sorenson's former wife turned over to the State her right to collect the payments Mr. Sorenson had failed to make.

Stanley and Marie Sorenson also had their own dependent child living with them. They thus were potentially eligible to receive an earned-income credit. For the calendar year 1981, the time relevant to this lawsuit, § 43 of the Internal Revenue Code of 1954, as amended, provided that an individual responsible for the support of a child living with him was allowed "as a credit against the tax imposed . . . for the taxable year an amount equal to 10 percent of so much of the earned income for the taxable year as does not exceed $5,000." As the amount of the taxpayer's earned income increased, the amount of the credit decreased, reaching zero when the taxpayer's adjusted gross income reached $10,000.[2]

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[1] Section 402(a)(26)(A) of the Social Security Act, as amended, 42 U. S. C. § 602(a)(26)(A), requires the assignment to the State of "any rights to support from any other person such applicant may have (i) in his own behalf or in behalf of any other family member for whom the applicant is applying for or receiving aid, and (ii) which have accrued at the time such assignment is executed."

Unlike certain other credits, which can be used only to offset tax that would otherwise be owed, the earned-income credit is "refundable." Thus, if an individual's earned-income credit exceeds his tax liability, the excess amount is "considered an overpayment" of tax under § 6401(b), as it then read, of the 1954 Code.[3] Subject to specified setoffs,

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[2] By the Tax Reform Act of 1984, Pub. L. 98–369, § 471(c)(1), 98 Stat. 826, Congress redesignated § 43 as § 32. By § 1042 of that Act, 98 Stat. 1043, it raised the earned-income percentage from 10 to 11 percent, the maximum amount of the credit from $500 to $550, and the eligibility ceiling from $10,000 to $11,000.

[3] At the time relevant to this lawsuit, § 6401(b) of the 1954 Code provided, in pertinent part:

"If the amount allowable as credits under sections 31 (relating to tax withheld on wages), and 39 (relating to certain uses of gasoline, special fuels, and lubricating oil), and 43 (relating to earned income credit), exceeds the tax imposed by subtitle A (reduced by the credits allowable under subpart A of part IV of subchapter A of chapter 1, other than the credits allowable under sections 31, 39, and 43), the amount of such excess shall be considered an overpayment."

Section 6401(b) was amended by the Tax Reform Act of 1984. Section 474(r)(36) of that Act, 98 Stat. 846, designated existing § 6401(b) as § 6401(b)(1) and substituted the following language for the language quoted above:

"If the amount allowable as credits under subpart C of part IV of subchapter A of chapter 1 (relating to refundable credits) exceeds the tax imposed by subtitle A (reduced by the credits allowable under subparts A, B, and D of such part IV), the amount of such excess shall be considered an overpayment."

§ 6402(a) directs the Secretary to credit or refund "any overpayment" to the person who made it.[4] An individual who is entitled to an earned-income credit that exceeds the amount of tax he owes thereby receives the difference as if he had overpaid his tax in that amount.

B

In February 1982, petitioner and her husband timely filed a joint federal income tax return for the calendar year 1981. Petitioner had worked during part of that year, and all the Sorenson family income for the year was attributable to her wages and unemployment compensation benefits. By the return so filed, the Sorensons anticipated a refund of $1408.90, consisting in part of excess withholding on petitioner's wages and in part of an earned-income credit. The Internal Revenue Service, however, notified the Sorensons that $1,132 of the anticipated refund was being retained, under the authority granted it by the tax-intercept law, and

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The earned-income credit remains refundable under the revised provision, since it is within the category of "refundable credits." See Tax Reform Act of 1984, § 471, 98 Stat. 825.

[4] The version of § 6402(a) in effect for the tax year 1981 provided:

"In the case of any overpayment, the Secretary, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall, subject to subsection (c), refund any balance to such person."

The question presented by this case is the scope of subsection (c)—the provision governing the offset of past-due child-support payments.

Section 2653(b)(2) of the Spending Reduction Act of 1984, 98 Stat. 1155, amended § 6402(a). Under amended § 6402(a), the Secretary's authority, with respect to refunds payable after December 31, 1985, and before January 1, 1988, see § 2653(c) of the 1984 Act, 98 Stat. 1156, is restricted by a new subsection (d) as well as by subsection (c) of § 6402. Section 2653(b)(1) of the 1984 Act, 98 Stat. 1154, added the new subsection (d). Section 6402(d) requires the offset of debts owed to various federal agencies. Under § 6402(d)(2), the collection of past-due child-support payments pursuant to § 6402(c) has priority over the collection of debts covered by § 6402(d).

would be paid over to the State of Washington because that State had been assigned the right to collect Mr. Sorenson's unpaid child-support obligations. See Second Declaration of Peter Greenfield, Exh. B, *Sorenson* v. *Secretary of Treasury*, No. C82–441C (WD Wash.).

The tax-intercept law essentially directs the Secretary to give priority to a State's claim for recoupment of welfare payments made to a family who failed to receive child support, see § 402(a)(26)(A) of the Social Security Act, as amended, 42 U. S. C. § 602(a)(26)(A), over an individual's claim for refund of tax overpayment. See § 6402(a), as amended, of the 1954 Code. The intercept law originally was enacted as part of the Omnibus Budget Reconciliation Act of 1981 (OBRA), Pub. L. 97–35, § 2331, 95 Stat. 860. First, OBRA § 2331(a) added § 464 to the Social Security Act, 42 U. S. C. § 664. That section directs the Secretaries of the Treasury and of Health and Human Services to establish a scheme by which a State is to notify the Secretary of the Treasury of persons who owe past-due child-support payments that have been assigned to it, and directs the Secretary of the Treasury to intercept tax-refund payments that would otherwise be paid to those persons:

> "Upon receiving notice from a State agency administering [an AFDC plan] . . . that a named individual owes past-due support which has been assigned to such State pursuant to section 402(a)(26), the Secretary of the Treasury shall determine whether any amounts, as refunds of Federal taxes paid, are payable to such individual (regardless of whether such individual filed a tax return as a married or unmarried individual). If the Secretary of the Treasury finds that any such amount is payable, he shall withhold from such refunds an amount equal to the past-due support, and pay such amount to the State agency (together with notice of the individual's

home address) for distribution in accordance with section 457(b)(3)." § 464(a), 42 U. S. C. § 664(a).[5]

Section 2331(c) of OBRA amended the Internal Revenue Code. It added a new subsection to the provision governing the Secretary of the Treasury's authority to refund overpayments to taxpayers. The new subsection, § 6402(c), requires the Secretary to withhold from the refund otherwise due the taxpayer the amount owed the State in past-due child support and to remit the amount withheld to the State:

> "The amount of any overpayment to be refunded to the person making the overpayment shall be reduced by the amount of any past-due support (as defined in section 464(c) of the Social Security Act) owed by that person of which the Secretary has been notified by a State in accordance with section 464 of the Social Security Act. The Secretary shall remit the amount by which the overpayment is so reduced to the State to which such support has been assigned and notify the person making the overpayment that so much of the overpayment as was necessary to satisfy his obligation for past-due support has been paid to the State. This subsection shall be applied to an overpayment prior to its being credited to a person's future liability for an internal revenue tax."

C

After negotiations concerning the status of tax refunds in community property States such as Washington—issues that are not germane to the question now presented to this Court—the Secretary ultimately withheld only half of the refund increment the Sorensons claimed. Petitioner then filed a class action in the United States District Court for the Western District of Washington seeking, among other things, a declaration that § 464 of the Social Security Act did not reach a refund attributable to an excess earned-income credit. The District Court rejected the Secretary's jurisdictional arguments, which were renewed on appeal to the Court of Appeals but which are not pressed in this Court. See Brief for Respondents 5, n. 1. But it agreed with the Secretary's arguments on the merits and granted summary judgment for the Government. 557 F. Supp. 729 (1982).

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[5] Section 464(a) was amended by the Child Support Enforcement Amendments of 1984, Pub. L. 98–378, § 21, 98 Stat. 1322, which authorized the interception and diversion of refunds for the benefit of non-AFDC children as well as children receiving AFDC benefits. The Amendments also provided additional procedural protections for refund claimants whose refunds are intercepted.

The Court of Appeals affirmed that judgment. 752 F. 2d 1433 (CA9 1985). It rejected petitioner's statutory construction arguments, and held that, since the Code expressly defined excess earned-income credits as "overpayments," and disbursed those excess credits to recipients through the income tax refund process, the credits were "payable '*as*' refunds of federal taxes paid" and therefore could be intercepted. *Id.*, at 1441 (emphasis in original). Congress used the broad terms "any amounts" and "any overpayment" in the tax-intercept law and gave no indication that it intended to exclude earned-income credit payments from these terms.

The Court of Appeals also rejected petitioner's argument that the Secretary's position conflicted with Congress' intention to provide benefits to the poor through the earned-income credit. First, the legislative history of § 43 did not suggest that the earned-income credit was intended primarily as a type of welfare grant; rather, it was meant to negate the disincentive to work caused by Social Security taxes. Since the earned-income credit was payable as a lump sum, it was more like excess withholding, which was clearly reachable by the intercept program, than it was like wages, a portion of which Congress exempted from the assessment and collection process. See 752 F. 2d, at 1443, n. 1. Second, had Congress intended to exempt earned-income credit payments from the intercept program, it could have done so expressly. Instead, it provided that any amount payable through the federal tax-refund process might be intercepted. "In the face of this rather clear statutory mandate," said the Court of Appeals, "we conclude that we are not free to speculate that Congress intended otherwise." *Id.*, at 1443.

II

Petitioner advances two arguments to support her claim that an excess earned-income credit cannot be intercepted. First, she claims that the language and structure of the interlocking statutory provisions that make up the intercept law exclude an earned-income credit from its reach: excess earned-income credits are neither "overpayments" nor "refunds of Federal taxes paid," and only those items are subject to interception. Second, she claims that permitting interception of an earned-income credit would frustrate Congress' aims in providing the credit, and thus that Congress could not have intended the intercept law to reach earned-income credits. We find neither argument persuasive.

A

The Internal Revenue Code's treatment of earned-income credits supports the Government's position. An individual can receive the amount by which his entitlement to an earned-income credit exceeds his tax liability only because § 6401(b) of the Code defines that amount as an "overpayment," and § 6402 provides a mechanism for disbursing overpayments, namely, the income tax refund process. The refundability of the earned-income credit is thus inseparable from its classification as an overpayment of tax. Petitioner therefore acknowledges that the excess earned-income credit is an "overpayment" for purposes of § 6402(a), the general provision that authorizes all tax refunds. See n. 4, *supra.* If it were not, the Secretary would lack authorization for refunding it to her. She claims, however, that while an excess earned-income credit is an "overpayment" for purposes of § 6402(a), it is not an "overpayment" for purposes of § 6402(c), which requires that the "amount of any overpayment . . .

shall be reduced by the amount of any past-due support" assigned to the State.

The normal rule of statutory construction assumes that "'identical words used in different parts of the same act are intended to have the same meaning.'" *Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84, 87 (1934), quoting *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427, 433 (1932). That the Internal Revenue Code includes an explicit definition of "overpayment" in the same subchapter strengthens the presumption. And that both subsections concern the tax-refund treatment of "overpayment[s]" is especially damaging to any claim that "the words, though in the same act, are found in such dissimilar connections as to warrant the conclusion that they were employed in the different parts of the act with different intent." *Stockholms Enskilda Bank*, 293 U. S., at 87.

Petitioner and the two Courts of Appeals that have excluded excess earned-income credits from the definition of "overpayment" used in § 6402(c) offer two bases for their position. First, they believe that § 6402(c) limits § 6401(b)'s broad definition "by [using] the phrase 'overpayment to be refunded to the person making the overpayment.'" *Nelson* v. *Regan*, 731 F. 2d, at 111; see *Rucker* v. *Secretary of Treasury*, 751 F. 2d, at 356. Not all overpayments, they suggest, are refunded to persons who "made" them, since some—those consisting of earned-income credits—may be refunded to persons who actually have not paid any tax. We disagree. *All* refunds made by the Secretary under § 6402(a) are paid to "the person who made the overpayment." The phrase merely identifies the *person* entitled to the refund; it does not restrict the nature of the refund itself. Petitioner must characterize herself as a person who has "made" an overpayment; otherwise, she cannot claim her excess earned-income credit. The phrase in § 6402(c) on which petitioner and the Second and Tenth Circuits relied is virtually identical to the phrase used in § 6402(a). Since the words cannot have the limiting effect petitioner proposes when used in § 6402(a), no justification exists for giving them such a construction in § 6402(c).

Second, petitioner and the Second and Tenth Circuits perceive a tension between § 6401(b)'s and § 6402(a)'s treatment of excess earned-income credits and § 464(a)'s treatment of interceptable amounts. As used in those Code sections, "overpayment" includes more than "refunds of Federal taxes paid," the phrase used in the Social Security Act. Since § 464 and § 6402(c) were enacted simultaneously as part of OBRA, petitioner and the two Circuits believe that § 6402(c) should be harmonized with § 464 rather than with §§ 6401(b) and 6402(a). See *Rucker* v. *Secretary of Treasury*, 751 F. 2d, at 357; *Nelson* v. *Regan*, 731 F. 2d., at 111.

This second argument, it seems to us, misperceives the structure of the tax-intercept law, and manufactures a tension that need not exist. OBRA's placement of provisions regarding interception in both Acts reflects a division of functions. The tax-intercept program lies at the intersection of the Social Security Act's concern in Subchapter IV, Part D, with child support, and the Internal Revenue Code's concern in Chapter 65, Subchapter A, with the treatment of credits in the tax-refund process. Section 464 addresses the concerns of the States that have received AFDC-related grants. It defines past-due child support, authorizes procedures by which the States can notify the Secretary of the Treasury of their entitlement to recover such past-due support, and directs the Secretary to aid the States, through his control over the tax-refund process, in recouping that support. Sections 6401 and 6402 address the operation of the tax-refund process under the Internal Revenue Code. They define the status of certain tax credits, set up a mechanism for disbursing refunds, and direct the Secretary to divert certain amounts from the refund process. To the extent that the tax-intercept law regulates the relationship of the Secretary of the Treasury to refund claimants, it does so through

§ 6402, and not through a provision that governs the Secretary's relationship to state agencies.

Petitioner, however, views § 6402(c)'s reference to § 464 as indicating that § 464(a) is meant to be read into § 6402(c) as a limitation on the Secretary's intercept powers. This argument depends on a somewhat strained construction of § 6402(c)'s statement that "[t]he amount of any overpayment to be refunded to the person making the overpayment shall be reduced by the amount of any past-due support . . . owed by that person of which the Secretary has been notified by a State in accordance with section 464 of the Social Security Act." Petitioner claims that "[t]he words 'in accordance with section 464 of the Social Security Act' . . . do not modify 'has been notified by a State,' as one might initially assume. Rather they belatedly modify the words 'shall be reduced.'" Brief for Petitioner 18. In petitioner's view, her construction would lead to the conclusion that a refund can be reduced only to the extent that the refund represents a refund of tax actually paid, since that is all § 464(a) permits.

We disagree with both petitioner's construction of § 6402(c) and her reading of § 464(a). First, it seems far more plausible that the words modify the nearest verb. If they are given this more natural reading, then § 6402(c) directs the Secretary to intercept only that amount which properly is classified as past-due support and of which he properly has been notified.

But even if the reference in § 6402(c) to § 464 were read to refer solely to § 464(a),[6] nothing in that subsection exempts excess earned-income credits from interception. Petitioner and the Second and Tenth Circuits recast their argument regarding the meaning of "overpayment" by contending that the amount of a refund that is attributable to an excess earned-income credit is not a "refun[d] of Federal taxes paid," and that § 464(a) permits interception of only "amounts, as refunds of Federal taxes paid":

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[6] In light of Congress' specific reference to § 464(c) earlier in § 6402(c), it seems particularly likely that Congress would have referred to subsection (a) of § 464 expressly had it meant "in accordance with § 464(a)" rather than in accordance with the entire scheme for identifying past-due support payments and notifying the Federal Government of such obligations set out in § 464.

> "A refund of federal taxes is a repayment of money paid by a taxpayer in excess of that taxpayer's liability. Although the earned income credit is given effect through the income tax return, the credit is not a tax refund because eligibility for the credit is not contingent upon payment of any federal income tax." *Rucker* v. *Secretary of Treasury*, 751 F. 2d, at 356.

But just as eligibility for an earned-income credit does not depend upon an individual's actually having paid any tax, the Code's classification of the credit as an "overpayment" to be refunded is similarly independent of the individual's actually having made any payment. Cf. § 6401(c). The Ninth Circuit correctly held that, to the extent an excess earned-income credit is "payable" to an individual, it is payable *as if* it were a refund of tax paid. 752 F. 2d, at 1441. Section 464(a)'s reference to the tax-refund process is best understood as a directive to the Secretary that he follow the procedures established by the Internal Revenue Code for calculating and disbursing refunds, rather than as an attempt implicitly to redefine terms given special meaning by the Code.

B

Nor do we agree with petitioner's claim that Congress did not intend the intercept program to reach excess earned-income credits. Petitioner and the Government agree that Congress never mentioned the earned-income credit in enacting OBRA. See Brief for Petitioner 24; Tr. of Oral Arg. 21. But it defies belief that Congress was unaware, when it provided in § 6402(c) that "*any* overpayment to be refunded . . . shall be reduced by the amount of any past-due support" (emphasis added), that this would include refunds attributable to excess earned-income credits. Congress had previously expressly defined an excess earned-income credit as an "overpayment," in § 6401(b) of the Internal Revenue Code—the section immediately preceding the section to which Congress added the intercept provision.[7]

What petitioner and the Second and Tenth Circuits are really claiming is that the intercept law should be read narrowly to avoid frustrating the goals of the earned-income credit program. The earned-income credit was enacted to reduce the disincentive to work caused by the imposition of Social Security taxes on earned income (welfare payments are not similarly taxed), to stimulate the economy by funneling funds to persons likely to spend the money immediately, and to provide relief for low-income families hurt by rising food and energy prices.[8] Each is an undeniably important objective. It is impossible, however, for us to say that these goals outweigh the goals served by the subsequently enacted tax-intercept program—securing child support from absent parents whenever possible and reducing the number of families on welfare.[9] Congress of course could conclude that families eligible for earned-income credits have a more compelling claim to the funds involved than do either the States or non-AFDC families. But it is equally clear that Congress could have decided that the more pressing need was to alleviate the "devastating consequences for children and the taxpayers" of the epidemic of nonsupport. See Hearings before the Senate Committee on Finance on Spending Reduction Proposals, 97th Cong., 1st Sess., pt. 1, p. 34 (1981) (statement of Secretary Schweiker).[10]

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[7] That Congress could not have viewed the earned-income credit as immune from seizure to satisfy child-support obligations is suggested by a number of other factors as well. As the Government notes, once an individual has actually received his tax-refund payment, the proceeds of that refund, even if they reflect an earned-income credit component, are subject to levy under § 6305 of the Code. The fact that the Government may not have used this cumbersome procedure, see Tr. of Oral Arg. 23–25, reflects the economic inefficiency of locating and pursuing a payment that cannot exceed $550 rather than a lack of authority to do so. And certainly no one has suggested that the former spouse to whom a support obligation not assigned to the State is owed would be precluded from employing the judicial process to attach and seize the credit once the recipient had received it.

[8] See, *e. g.*, S. Rep. No. 94–36, pp. 11, 33 (1975); H. R. Rep. No. 94–19, pp. 3–4, 29–31 (1975); Hearings on H. R. 2166 before the Senate Committee on Finance, 94th Cong., 1st Sess., 66, 315 (1975); Hearings before the House Committee on Ways and Means on the President's Authority to Adjust Imports of Petroleum; Public Debt Ceiling Increase; and Emergency Tax Proposals, 94th Cong., 1st Sess., 661, 742–743, 797 (1975); 121 Cong. Rec. 4609 (1975).

The ordering of competing social policies is a quintessentially legislative function. In light of Congress' decision to direct the interception of *any* overpayment otherwise refundable to a taxpayer, the Ninth Circuit correctly refused to "speculate that Congress intended otherwise." 752 F. 2d, at 1443. Its judgment, accordingly, is affirmed.

It is so ordered.

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[9] See, *e. g.*, S. Rep. No. 98-387, pp. 5-8 (1984); Hearings before the Senate Committee on Finance on Spending Reduction Proposals, 97th Cong., 1st Sess., pt. 1, pp. 19, 34-35, 81, 312 (1981); Hearings before the House Committee on Ways and Means on Tax Aspects of the President's Economic Program, 97th Cong., 1st Sess., pt. 1, pp. 159, 237 (1981).

[10] Even if Congress' sole concern were providing funds to the neediest children involved, it is far from certain that all children living in households receiving refunds of earned-income credits are needier than all children owed past-due child support. When the earned-income credit is claimed at the end of the tax year (an individual can, pursuant to § 3507 of the Code, receive an advance on his earned-income credit over the course of the year), it may in fact go to a recipient who is not currently needy. For example, an individual, with a dependent child, who was unemployed during most of 1981 and therefore earned only $5,000, but found a job paying $20,000 per year on January 1, 1982, would have been able to claim in a tax return filed in April 1982 an earned-income credit of $500, despite the fact that, in late spring 1982, when the refund check ultimately arrived, the individual might no longer be needy.

JUSTICE STEVENS, dissenting.

The class of persons that Congress intended to benefit by creating the "Earned Income Credit" Program in 1975 is composed entirely of low-income families.[1] The Court has fairly described the purposes of the 1975 legislation:

> "The earned-income credit was enacted to reduce the disincentive to work caused by the imposition of social security taxes on earned income (welfare payments are not similarly taxed), to stimulate the economy by funneling funds to persons likely to spend the money immediately, and to provide relief for low-income families hurt by rising food and energy prices." *Ante*, at 864.

The mechanism by which Congress funneled the funds to those persons was to treat the credits as though their recipients had overpaid their taxes, giving them a right to a "refund" of a hypothetical overpayment. This relatively obscure provision of the Internal Revenue Code gave rise to no particular difficulties for the ensuing six years.

The principal beneficiaries of the Intercept Program enacted by Congress as part of what is appropriately called the Omnibus Budget Reconciliation Act of 1981 were state governments which had claims for recoupment of welfare payments made to families that were unable to enforce a departed parent's child-support obligations. Thus, the real adversaries in this case are the Sorensons—a low-income family—on the one hand, and the State of Washington, on the other, which will ultimately receive the intercepted "refund" under the Court's holding. The question is whether Congress in 1981 intended to divert these federal funds from the original beneficiaries of the Earned Income Credit Program to the treasuries of state governments. Notwithstanding the Court's careful and admittedly accurate parsing of the language of the statute, I am not persuaded that Congress had any such intent.

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[1] 121 Cong. Rec. 8861 (1975) (remarks of Sen. Long).

The Court confidently asserts that "it defies belief that Congress was unaware" of the impact of its Intercept Program upon the Earned Income Credit Program when it enacted OBRA in 1981. See *ante,* at 863. The Court does not pause to tell us why, if that be so, Congress did not even mention this important change at any point in the legislative history of OBRA. With all due respect to the Court and to our hardworking neighbors in the Congress, I think "it defies belief" to assume that a substantial number of legislators were sufficiently familiar with OBRA to realize that somewhere in that vast piece of hurriedly enacted legislation there was a provision that changed the 6-year-old Earned Income Credit Program.[2]

I agree that the Court's reading of the statutory language is faithful to its grammar. I am not persuaded, however, that it actually reflects the intent of the Congress that enacted OBRA. I therefore would accept the construction of the relevant statutes adopted by the Courts of Appeals for the Second and Tenth Circuits. See *Rucker* v. *Secretary of Treasury,* 751 F. 2d 351, 356–357 (CA10 1984); *Nelson* v. *Regan,* 731 F. 2d 105, 110–112 (CA2), cert. denied *sub nom. Manning* v. *Nelson,* 469 U. S. 853 (1984). I respectfully dissent.

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[2] "Smoking a big cigar, the Speaker [of the House of Representatives] got angry again over the slap-dash quality of the bill [that became the Omnibus Budget Reconciliation Act of 1981], with parts of it photocopied from memorandums, other parts handwritten at the last minute, and some final sections hastily crossed out in whorls of pencil marks.

. . . . .

"But then he smiled, too, noting such cryptic and accidental entries in the bill as a name and phone number—'Ruth Seymour, 225–4844'—standing alone as if it were a special appropriation item." N. Y. Times, July 1, 1981, p. A16, col. 1.

NEW YORK *v.* P. J. VIDEO, INC., DBA NETWORK VIDEO, ET AL.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 85-363. Argued March 4, 1986—Decided April 22, 1986

Following an investigation by the Erie County, N. Y., District Attorney's Office, an investigator viewed videocassette movies that had been rented from respondents' store by a member of the County Sheriff's Department. The investigator then executed affidavits summarizing the theme of, and conduct depicted in, each movie. These affidavits were attached to an application for a warrant to search respondents' store, and a New York Supreme Court Justice issued the warrant authorizing the search and the seizure of the movies. The warrant was executed, and the movies were seized. Respondents were charged in a New York Justice Court with violating the New York obscenity statute and moved to suppress the seized movies on the ground that the warrant was issued without probable cause to believe that the movies were obscene. The Justice Court granted the motion and dismissed the charges, and both the County Court and the New York Court of Appeals affirmed. The Court of Appeals held that there was a "higher" probable-cause standard for issuing warrants to seize such things as books and movies than for warrants to seize such things as weapons or drugs, and that under this "higher" standard there was insufficient information in the affidavits to permit the issuing justice to believe that the movies in question were obscene under New York law.

Held: No "higher" probable-cause standard was required by the First Amendment for issuance of the warrant in question. An application for a warrant authorizing the seizure of materials presumptively protected by the First Amendment should be evaluated under the same probable-cause standard used to review warrant applications generally, namely, that there is a "fair probability" that evidence of a crime will be found in the particular place to be searched. Evaluating the supporting affidavits here under this standard, the warrant was supported by probable cause to believe that the movies were obscene under New York law, and they should not have been suppressed. Pp. 873–878.

65 N. Y. 2d 566, 483 N. E. 2d 1120, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and O'CONNOR, JJ., joined.

MARSHALL, J., filed a dissenting opinion, in which BRENNAN and STEVENS, JJ., joined, *post,* p. 884.

John J. DeFranks argued the cause for petitioner. With him on the briefs was *Richard J. Arcara.*

Paul John Cambria, Jr., argued the cause and filed a brief for respondents.*

JUSTICE REHNQUIST delivered the opinion of the Court.

This case concerns the proper standard for issuance of a warrant authorizing the seizure of materials presumptively protected by the First Amendment. Respondents P. J. Video, Inc., and James Erhardt were charged in the village of Depew, New York, Justice Court with six counts of obscenity in the third degree under § 235.05(1) of the New York Penal Law.[1] Respondents moved to suppress five videocassette movies that had been seized from respondents' store, and that formed the basis for the obscenity charges against respondents, on the ground that the warrant authorizing the seizure was issued without probable cause to believe that the movies were obscene. The Justice Court granted the motion and dismissed the informations under which respondents were charged, and both the County Court of Erie County and the New York Court of Appeals affirmed. 65 N. Y. 2d 566, 483 N. E. 2d 1120 (1985). We granted certiorari to resolve the conflict between the decision of the New York Court of Appeals in the instant case and the decisions in *Sequoia Books, Inc.* v. *McDonald*, 725 F. 2d 1091 (CA7 1984), and *United States* v. *Pryba*, 163 U. S. App. D. C. 389, 502 F. 2d 391 (1974), cert. denied, 419 U. S. 1127 (1975). 474 U. S. 918 (1985). We now reverse the judgment of the Court of Appeals.

**Charles B. Ruttenberg* and *James P. Mercurio* filed a brief for the Video Software Dealers Association as *amicus curiae* urging affirmance.

[1] Section 235.05(1) (McKinney Supp. 1986) provides:

"A person is guilty of obscenity in the third degree when, knowing its content and character, he:

> "1. Promotes, or possesses with intent to promote, any obscene material . . . ."

"Obscenity in the third degree is a class A misdemeanor."

The statutory definition of "obscenity," which is derived from *Miller* v. *California,* 413 U. S. 15 (1973), appears at § 235.00(1) (McKinney 1980):

". . . Any material or performance is 'obscene' if (a) the average person, applying contemporary community standards, would find that considered as a whole, its predominant appeal is to the prurient interest in sex, and (b) it depicts or describes in a patently offensive manner, actual or simulated: sexual intercourse, sodomy, sexual bestiality, masturbation, sadism, masochism, excretion or lewd exhibition of the genitals, and (c) considered as a whole, it lacks serious literary, artistic, political, and scientific value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audiences."

The obscenity charges against respondents arose out of an investigation by the Erie County District Attorney's Office. Investigator David J. Groblewski was assigned to review 10 videocassette movies that had been rented from respondents' store by a member of the Erie County Sheriff's Department.[2] Groblewski viewed the movies in their entirety, and executed affidavits summarizing the theme of, and conduct depicted in, each film. The affidavits were attached to an application filed by the village of Depew Police Department for a warrant to search respondents' store.

A justice of the New York Supreme Court issued the warrant, authorizing the search of the store and the seizure of the movies. The warrant was executed the next day and, according to a sworn, itemized inventory statement, the police seized 1 or 2 copies of each of the 10 movies. A total of 13 videocassettes were seized. The justice who had issued the warrant ordered that the videocassettes be temporarily retained by the police as evidence for trial. See N. Y. Crim. Proc. Law §§690.05–690.55 (McKinney 1984).

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[2] The 10 movies were entitled "California Valley Girls," "Taboo II," "Taboo," "All American Girls," "Debbie Does Dallas," "Body Magic," "Deep Throat," "Every Which Way She Can," "Filthy Rich," and "Little Girls Blue."

Respondents ultimately were charged in the village of Depew Justice Court with violating the New York obscenity laws with respect to only 5 of the 10 movies. The affidavits describing these five movies appear in full in the Appendix to this opinion.[3] Respondents moved for suppression of the seized videocassettes, alleging that the warrant authorizing their seizure was not supported by probable cause because the issuing justice had not personally viewed the movies. The Justice Court granted the motion and dismissed the informations under which respondents were charged, and on the State's appeal the County Court of Erie County affirmed.

The New York Court of Appeals likewise affirmed, although on a different theory than that of the Justice Court. According to the Court of Appeals, "there is a higher standard for evaluation of a warrant application seeking to seize such things as books and films, as distinguished from one seeking to seize weapons or drugs, for example (*Roaden* v. *Kentucky*, [413 U. S. 496], 504 [1973]; *Marcus* v. *Search Warrant*, 367 U. S. 717, 730–731 [1961]). In applying the [Fourth] Amendment to such items, the court must act with 'scrupulous exactitude' (*Stanford* v. *Texas*, 379 U. S. 476, 481–485 [1965]; *see also, Maryland* v. *Macon*, 472 U. S. 463 [1985])." 65 N. Y. 2d, at 569–570, 483 N. E. 2d, at 1123 (footnote omitted). Using this "higher" probable-cause standard to review the affidavits submitted in support of the warrant application, the Court of Appeals stated:

> "Many of the scenes described contain explicit sexual activity, patently offensive by any constitutional standard, but the allegations of the affidavits do not indicate whether they constitute all, most or a few of the scenes

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[3] The five movies that formed the basis for the obscenity charges against respondents were "California Valley Girls," "Taboo II," "Taboo," "All American Girls," and "Debbie Does Dallas."

> presented in the films. . . . The descriptions of the action are not supplemented by references to the narrative or dialogue of the films and the affiant attempted to describe the 'character' or 'theme' of the movies by settings having nothing to do with the plot . . . . He made no attempt to reveal the story line (or lack of one) of the films or demonstrate that their 'predominant appeal' was to prurient interest. In short, none of the affidavits permit an inference that the scenes described are more than a catalog of offensive parts of the whole." *Id.*, at 570–571, 483 N. E. 2d, at 1124.

The Court of Appeals concluded that the affidavits did not contain sufficient information to permit the issuing justice, "applying contemporary community standards, to judge the films as a whole and determine that they are within the statutory definitions of obscenity and thus are not entitled to constitutional protection." *Id.*, at 572, 483 N. E. 2d, at 1124 (footnote omitted). One judge dissented, arguing that the affidavits contained enough information for the issuing justice "to reasonably believe that the video movies were obscene as legislatively defined." *Id.*, at 573, 483 N. E. 2d, at 1125 (Jasen, J., dissenting).[4]

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[4] Respondents argue that the decision of the New York Court of Appeals rested on adequate and independent state grounds, namely, provisions of the New York Constitution and various state-court decisions, and that we therefore lack jurisdiction to review that decision. We disagree. As we explained in *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985):

"[W]e will not assume that a state-court decision rests on adequate and independent state grounds when the 'state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion.'" *Id.*, at 327, quoting *Michigan* v. *Long*, 463 U. S. 1032, 1040–1041 (1983).

Here, the New York Court of Appeals cited the New York Constitution only once, near the beginning of its opinion, and in the same parenthetical also cited the Fourth Amendment to the United States Constitution. Moreover, the Court of Appeals repeatedly referred to the "First Amend-

We have long recognized that the seizure of films or books on the basis of their content implicates First Amendment concerns not raised by other kinds of seizures. For this reason, we have required that certain special conditions be met before such seizures may be carried out. In *Roaden* v. *Kentucky*, 413 U. S. 496 (1973), for example, we held that the police may not rely on the "exigency" exception to the Fourth Amendment's warrant requirement in conducting a seizure of allegedly obscene materials, under circumstances where such a seizure would effectively constitute a "prior restraint." In *A Quantity of Books* v. *Kansas*, 378 U. S. 205 (1964), and *Marcus* v. *Search Warrant*, 367 U. S. 717 (1961), we had gone a step farther, ruling that the large-scale seizure of books or films constituting a "prior restraint" must be preceded by an adversary hearing on the question of obscenity. In *Heller* v. *New York*, 413 U. S. 483 (1973), we emphasized that, even where a seizure of allegedly obscene materials would not constitute a "prior restraint," but instead would merely preserve evidence for trial, the seizure must be made pursuant to a warrant and there must be an opportunity for a prompt postseizure judicial determination of obscenity. And in *Lee Art Theatre, Inc.* v. *Virginia*, 392 U. S. 636 (1968), we held that a warrant authorizing the seizure of materials presumptively protected by the First Amendment may not issue based solely on the conclusory allegations of a police officer that the sought-after materials are obscene, but instead must be supported by affidavits setting forth specific facts in order

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ment" and "Fourth Amendment" during its discussion of the merits of the case, strongly indicating that it believed that its decision was governed by federal law. Finally, although the Court of Appeals cited several state-court decisions, the only citations appended to the crucial language quoted in the text were to the federal decisions in *Roaden* v. *Kentucky*, 413 U. S. 496 (1973), *Marcus* v. *Search Warrant*, 367 U. S. 717 (1961), *Stanford* v. *Texas*, 379 U. S. 476 (1965), and *Maryland* v. *Macon*, 472 U. S. 463 (1985). We conclude, in the absence of a "plain statement" to the contrary, that the decision of the Court of Appeals was premised on federal, not state, law.

that the issuing magistrate may "focus searchingly on the question of obscenity." *Marcus*, *supra*, at 732; see also *Stanford* v. *Texas*, 379 U. S. 476, 486 (1965).[5]

The New York Court of Appeals construed our prior decisions in this area as standing for the additional proposition that an application for a warrant authorizing the seizure of books or films must be evaluated under a "higher" standard of probable cause than that used in other areas of Fourth Amendment law. But we have never held or said that such a "higher" standard is required by the First Amendment. In *Heller*, we said:

> "[S]eizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the *bona fide* purpose of preserving it as evidence in a criminal proceeding, particularly where, as here, there is no showing or pretrial claim that the seizure of the copy prevented continuing exhibition of the film. If such a seizure is pursuant to a warrant, *issued after a determination of probable cause by a neutral magistrate*, and, following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party, the seizure is constitutionally permissible. . . .
>
> "*The necessity for a prior judicial determination of probable cause* will protect against gross abuses . . . ." 413 U. S., at 492–493 (emphasis added; footnotes omitted).

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[5] Contrary to the position apparently taken by the Justice Court in the instant case, we have never held that a magistrate must personally view allegedly obscene films prior to issuing a warrant authorizing their seizure. See *Lee Art Theatre, Inc.* v. *Virginia*, 392 U. S., at 637. On the contrary, we think that a reasonably specific affidavit describing the content of a film generally provides an adequate basis for the magistrate to determine whether there is probable cause to believe that the film is obscene, and whether a warrant authorizing the seizure of the film should issue.

We think that this passage from *Heller*, emphasizing the requirement that the magistrate determine probable cause as a means of safeguarding First Amendment interests, and eschewing any suggestion that the standard of probable cause in the First Amendment area is different than in other contexts, suggests that we saw no need for the latter requirement. In our view, the longstanding special protections described above, and enunciated in cases such as *Roaden*, *A Quantity of Books*, *Marcus*, *Heller*, and *Lee Art Theatre*, are adequate to ensure that First Amendment interests will not be impaired by the issuance and execution of warrants authorizing the seizure of books or films. We think, and accordingly hold, that an application for a warrant authorizing the seizure of materials presumptively protected by the First Amendment should be evaluated under the same standard of probable cause used to review warrant applications generally.[6]

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[6] Respondents contend that the seizure in the instant case was not limited to only one copy of each film, but instead extended to all copies of the films that the police were able to find during their search of respondents' store. According to respondents, the seizure had the effect of severely restricting public access to the films, and thereby constituted a "prior restraint." Respondents therefore argue that this case is properly governed not by *Heller* v. *New York*, 413 U. S. 483 (1973), but by *Roaden* v. *Kentucky*, *supra*, where this Court stated that the seizure of an allegedly obscene film, under circumstances where the seizure "brought to an abrupt halt an orderly and presumptively legitimate . . . exhibition" of the film, "calls for a higher hurdle in the evaluation of reasonableness." *Id.*, at 504.

We reject this contention. Our reference in *Roaden* to a "higher hurdle . . . of reasonableness" was not intended to establish a "higher" standard of probable cause for the issuance of a warrant to seize books or films, but instead related to the more basic requirement, imposed by that decision, that the police not rely on the "exigency" exception to the Fourth Amendment warrant requirement, but instead obtain a warrant from a magistrate who has "'focus[ed] searchingly on the question of obscenity.'" *Id.*, at 506, quoting *Marcus* v. *Search Warrant*, *supra*, at 732.

We also note that the burden is on the defendant to make a pretrial showing of a "substantial restraint" if he wishes to escape the rule of *Heller*, *supra*, that a mere seizure to preserve evidence does not impose on

That standard was recently set forth by this Court in *Illinois* v. *Gates*, 462 U. S. 213 (1983):

> "'[T]he term "probable cause," . . . means less than evidence which would justify condemnation . . . . It imports a seizure made under circumstances which warrant suspicion.' [*Locke* v. *United States*, 7 Cranch 339, 348 (1813).] . . . Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision.
>
> . . . . .
>
> "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing,]' [*Jones* v. *United States*, 362 U. S. 257, 271 (1960),] that probable cause existed." *Id.*, at 235, 238–239.

Applying the *Gates* standard to the affidavits in the instant case, we think it clear beyond peradventure that the warrant was supported by probable cause to believe that the five films at issue were obscene under New York law. Respondents concede that the affidavits describing the five films adequately established probable cause with respect to the second of the three elements of obscenity under the statute, namely, that the movies depicted "in a patently offensive manner" the various kinds of sexual conduct specified in the statute. See N. Y. Penal Law § 235.00(1)(b) (McKinney 1980). Our review of the affidavits convinces us that the issuing justice also was given more than enough information to conclude that there was a "fair probability" that the movies satisfied

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the State a duty to conduct an adversary hearing of the sort described in *Marcus*, *supra*. Respondents made no such pretrial showing in this case.

the first and third elements of the statutory definition, namely, that the "predominant appeal [of the movies] is to the prurient interest in sex," and that the movies "lac[k] serious literary, artistic, political, and scientific value." See N. Y. Penal Law §§ 235.00(1)(a), (c) (McKinney 1980). As Judge Jasen of the Court of Appeals noted in his dissent in the present case:

> "Each of the affidavits describing the films clearly state at the outset that 'the *content* and character of the above mentioned video movie is as follows.' Inasmuch as the magistrate was reviewing affidavits describing movies which were advertised by defendants as 'adult cassette movies,' it was reasonable for him to believe that the affidavits faithfully and accurately described the substance of each movie as a whole. Each affidavit describes the numerous acts of deviate sexual intercourse and the objectification of women occurring in each film which the majority concede to be offensive. Each film is of relatively short duration. Manifestly, the acts described in each movie consume a substantial time span. Thus, the magistrate may reasonably have concluded that the described, successive acts of deviate sexual intercourse pervaded each film. When the title of each movie is considered together with its plot and setting, its general theme and serious value, if any, may reasonably be discerned. The films were described in each of the five nonconclusory affidavits in such a fashion as to permit the magistrate to focus searchingly on the issue of obscenity. Under these circumstances, there was a reasonable basis for the magistrate to authorize the seizure of the films in question." 65 N. Y. 2d, at 580, 483 N. E. 2d, at 1130 (emphasis in original).

We believe that the analysis and conclusion expressed by the dissenting judge are completely consistent with our statement in *Gates* that "probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." 462 U. S., at 244, n. 13. We hold that, evaluated under the correct standard of probable cause, the warrant was properly issued and the videocassettes of the five movies should not have been suppressed. The judgment of the New York Court of Appeals is accordingly reversed, and the cause remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

APPENDIX TO OPINION OF THE COURT

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

DAVID J. GROBLEWSKI, being duly sworn, deposes and says:

I am presently a Confidential Criminal Investigator assigned to the Erie County District Attorney's Office and prior to this, a member of the New York State Police for approximately 25 years.

On September 26th, 1983 I viewed the video tape movie "CALIFORNIA VALLEY GIRLS," which was rented on September 20th, 1983, from Network Video, 5868 Transit Road, Depew, New York. This movie was rented by Detective Sergeant Vincent Costanza, a member of the Erie County Sheriff's Department. This movie was viewed in my office starting at 12:00 Noon and lasted until 1:33 P.M.

The content and character of the above mentioned video movie is as follows: Six white females, approximately 18 to 25 years of age, are unemployed and attempt to make a living by becoming prostitutes. The first scene is a bedroom scene where two females are involved in love making, fondling and cunnilingus. The second scene depicts a white male and a white female having intercourse in the back of a van. The third scene is a house scene where six girls, all white females are introduced to the art of love making. One male, approximately 35 years of age, is teaching the girls the art of fellatio with each one of them performing this act on him. The next scene is a bedroom scene in a home where a husband and wife, a white male and a white female, alone with a girl, a white female, perform various sexual acts which include intercourse, fellatio, anal intercourse and cunnilingus. The movie ends with some lesbianism where the wife performs cunnilingus on the girl while she performs fellatio on the husband and they engage in intercourse and anal intercourse.

[Signature]
David J. Groblewski
Confidential Criminal
Investigator

Subscribed and sworn to
before me this [21] day
of November, 1983.

[Signature]
Notary Public

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

DAVID J. GROBLEWSKI, being duly sworn, deposes and says:

I am presently a Confidential Criminal Investigator assigned to the Erie County District Attorney's Office and prior to this, a member of the New York State Police for approximately 25 years.

On September 23rd, 1983, I viewed the video tape movie "TABOO II," which was rented on September 20th, 1983, from Network Video, 5868 Transit Road, Depew, New York. This movie was rented by Detective Sergeant Vincent Costanza, a member of the Erie County Sheriff's Department. This movie was viewed in my office starting at 9:00 A.M. and with several interruptions lasted until 12:12 P.M.

The content and character of the above mentioned video movie: The theme of the movie is a middle-class neighborhood where a home is the place where all the sexual acts are performed. The movie starts with a brother and sister, a white male and white female, fondling each other. The second scene is another house scene where a white male and white female are giving a rubdown to a white female. The sexual acts that follow include cunnilingus and fellatio. There is also intercourse and the scene closes with the male placing his penis between the girl's breasts and ejaculating into and over her mouth. In another scene there is some incestuous type activity between the brother and the sister where again fellatio and intercourse are performed. At one point during the movie the mother enters the bedroom and observes the two performing the sexual acts and becomes depressed about the situation. In a later scene the son and his mother are on a couch where they become involved in sexual acts of intercourse and fellatio. The movie closes with the mother and father asleep in their bedroom at which time the daughter enters and sleeps next to her father, where they perform incestuous acts of intercourse, and she performs fellatio on her father.

[Signature]

Subscribed and sworn to before me
this [21] day of November, 1983

[Signature]
Notary Public

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

DAVID J. GROBLEWSKI, being duly sworn, deposes and says:

I am presently a Confidential Criminal Investigator assigned to the Erie County District Attorney's Office and prior to this, a member of the New York State Police for approximately 25 years.

On September 29th, 1983, I viewed the video tape movie "TABOO," which was rented on September 27th, 1983 from Network Video, 5868 Transit Road, Depew, New York. This movie was rented by Detective Sergeant Vincent Costanza, a member of the Erie County Sheriff's Department. This movie was viewed in my office starting at 11:00 A.M. and lasted until 11:55 A.M. and watched again commencing at 1:42 P.M. and lasting until 2:23 P.M.

The content and character of the above mentioned video movie is as follows: The first scene is a bedroom scene where two white females and one white male perform various acts of fellatio, cunnilingus and intercourse. The second scene is a house party scene where many white males and white females are involved in various acts of intercourse, fellatio and cunnilingus. There is also a scene where females perform acts of cunnilingus on each other. The movie portrays at one point a bedroom scene with a white male, the son, laying in bed naked, at which time his mother, a white female enters the room. She makes love to him and incestuous acts of intercourse, placing of the penis between her breasts, ejaculation and cunnilingus are performed.

[Signature]
David J. Groblewski
Confidential Criminal
Investigator

Subscribed and sworn to
before me this [21] day
of November, 1983

[Signature]
Notary Public

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

DAVID J. GROBLEWSKI, being duly sworn, deposes and says:

I am presently a Confidential Criminal Investigator assigned to the Erie County District Attorney's Office and prior to this, a member of the New York State Police for approximately 25 years.

On September 28th, 1983, Detective Sergeant Vincent Costanza, a Member of the Erie County Sheriff's Department and I viewed the video tape movie "ALL AMERICAN GIRLS," which was rented on September 27th, 1983 from Network Video, 5868 Transit Road, Depew, New York. This movie was viewed in my office starting at 11:35 A.M., and lasted until 1:00 P.M.

The content and character of the above mentioned video movie is as follows: The theme of the movie is a home of one of the six girls, all white females who had previously attended high school and were meeting for a reunion. The first scene is two girls in a room performing acts of lesbianism, namely cunnilingus on each other. They are met by a white male and they perform acts of fellatio on him, have intercourse and all leave the room. Throughout the movie the girls reminisce about their high school days with each one depicting her sexual acts with her male partner. The sexual acts which followed included intercourse, fellatio and cunnilingus.

[Signature]
David J. Groblewski
Confidential Criminal
Investigator

Subscribed and sworn to
before me this [21] day
of November, 1983

[Signature]
Notary Public

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

DAVID J. GROBLEWSKI, being duly sworn, deposes and says:

I am presently a Confidential Criminal Investigator assigned to the Erie County District Attorney's Office and prior to this, a member of the New York State Police for approximately 25 years.

On October 3rd, 1983, Detective Sergeant Vincent Costanza, a member of the Erie County Sheriff's Department and I viewed the video tape movie "DEBBIE DOES DALLAS," which was rented on September 30th, 1983, by Vincent Costanza from Network Video, 5868 Transit Road, Depew, New York. This movie was viewed in my office starting at 2:50 P.M. and lasted until 4:23 P.M.

The content and character of the above mentioned video movie is as follows: The theme of the movie is a girl moving out west for a change of atmosphere. The first scene is a jail scene where a white female is in jail after she had been put there by the so-called Sheriff, a white male, and she performs fellatio on him. The two then perform intercourse, at which time he removes his pants and ejaculates over her buttocks. The second scene is the ranch, a so-called house of ill repute, a bedroom scene in which a white male and a white female are involved in various sexual acts including fellatio, cunnilingus and intercourse. At the end of the scene the male ejaculates in and over the female's mouth. The third scene, a bathroom scene, depicts some lesbianism involving three girls. They participate in love making, foreplay and performing cunnilingus on each other. Throughout, the movie depicts some lesbianism along with sexual acts of intercourse, fellatio and cunnilingus.

[Signature]
David J. Groblewski
Confidential Criminal
Investigator

Subscribed and sworn to before
me this [21] day of November, 1983

[Signature]
Notary Public

JUSTICE MARSHALL, with whom, JUSTICE BRENNAN and JUSTICE STEVENS join, dissenting.

Under New York law, a film depicting specified sexual acts in a patently offensive manner is obscene if "the average person, applying contemporary community standards, would find that considered as a whole, its predominant appeal is to the prurient interest in sex," and if "considered as a whole, it lacks serious literary, artistic, political, and scientific value." N. Y. Penal Law §§235.00(1)(a), (c) (McKinney 1980). The question before this Court is whether three New York state courts erred in holding that the affidavits at issue in this case failed to establish probable cause that those standards were met.[1] The determination of what the standards of

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[1] The New York Court of Appeals held that the third branch of the statute, providing that a film, to be obscene, must depict specified sexual acts "in a patently offensive manner, actual or simulated," §235.00(1)(b),

§ 235.00(1) mean and how they should be applied in individual cases, of course, is in the first instance a matter of state law and the rightful province of the state courts. While the majority describes it as "clear beyond peradventure," *ante*, at 876, that the affidavits set out the requisite probable cause, I do not find that result "clear" at all, and I would not overturn the state courts' contrary judgment.

I

The affidavits at issue in this case were first found inadequate at a suppression hearing in the Depew Justice Court. The court, per Justice Wick, noted that the issuing Magistrate had apparently not himself viewed the films, and that the retired state trooper who compiled the affidavits had "obviously paid no attention to contemporary community standards" and "made no further determination if the presentations had any literary, artistic, political or scientific value." App. to Pet. for Cert. A-37. Without stating clearly the exact basis of its decision, the court noted that "[t]he material contained [in the films] may be of the type proscribed by Section 235.05 of the Penal Law but equally, it may be . . . 'coarse, puerile, offensive and distasteful (and still not) obscene under the law or proscribable.'" *Id.*, at A-38, quoting *People* v. *Stabile*, 58 Misc. 2d 905, 296 N. Y. S. 2d 815 (N. Y. C. Crim. Ct. 1969). The court granted respondents' suppression motion.

The Erie County Court affirmed. Justice LaMendola noted the absence of a transcript of the proceedings, if any, before the issuing Magistrate, and declared it within the lower court's discretion to hold that "under New York law, the issuing magistrate had failed to make an adequate finding of probable cause . . . because he relied solely on the affidavits of the police officers without any further investigation or viewing of the materials to be confiscated." App. to Pet.

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was satisfied by the descriptions in the affidavits in this case. 65 N. Y. 2d 566, 570, n. 1, 483 N. E. 2d 1120, 1123, n. 1 (1985).

for Cert. A–33. Justice LaMendola's reference to "further investigation *or* viewing" makes it plain that she did not regard the issuing Magistrate's viewing of the film as an invariable requisite to issuance of a warrant. The affidavits in this case, however, unsupported by further investigation, provided insufficient basis for a warrant authorization.

The New York Court of Appeals affirmed. 65 N. Y. 2d 566, 483 N. E. 2d 1120 (1985). The court recognized that "the task of the issuing magistrate was not to decide guilt or innocence but to determine in a preliminary way from the information submitted and available to him whether there was probable cause to believe that the material to be seized was obscene within the tripartite definition of the statute." *Id.*, at 570, 483 N. E. 2d, at 1123. Applying that standard, it held the affidavits insufficient.

Near the beginning of its opinion, the New York court reiterated this Court's recent direction that the Fourth Amendment be applied with "'scrupulous exactitude'" in cases of searches for and seizures of presumptively protected materials, *Maryland* v. *Macon*, 472 U. S. 463, 468 (1985); see also *Stanford* v. *Texas*, 379 U. S. 476 (1965), and noted a "higher standard" for warrant determinations when books and films are seized, citing *Roaden* v. *Kentucky*, 413 U. S. 496 (1973). The New York court did not go on, however, to apply any extraordinary standard of scrutiny to the determination of probable cause. Rather, its holding was a simple one: "There must be enough information before [the issuing magistrate] in one form or other . . . to enable him to judge the obscenity of the film, not of isolated scenes from it." 65 N. Y. 2d, at 571, 483 N. E. 2d, at 1124. The affidavits, the court explained, merely cataloged offensive sex acts depicted in the films. Such catalogs say nothing about the "predominant appeal" of a film, its impact "considered as a whole," or its overall literary or artistic value. "Undoubtedly, similar lists could readily be compiled by excerpting descriptions of scenes from books and movies having recognized merit. Stanley Kubrick's 'Clockwork Orange' and Federico Fellini's 'Satyricon' come quickly to mind." *Ibid.* Because obscenity law requires examination of the films as a whole, the court held, probable cause cannot be inferred from the description of a few excerpted scenes. *Id.*, at 572, 483 N. E. 2d, at 1124.

II

Taken in the abstract, the New York court's reasoning is unassailable. A mere listing of sex acts depicted in a film, or a description of excerpted scenes, says little about the predominant effect of the film considered as a whole. It says nothing about whether the film, considered as a whole, has any artistic value. And it says nothing about how the film should be regarded in light of contemporary community standards. Such a description, then, cannot establish even probable cause to believe that the film is obscene. "[S]ex and obscenity are not synonomous." *Roth* v. *United States*, 354 U. S. 476, 487 (1957).[2] A magistrate armed only with such a description cannot "'focus searchingly on the question of obscenity,'" as the majority, *ante*, at 874, concedes he is obligated to do.

The majority's rejection of the New York court's reasoning appears to derive from a largely unarticulated feeling that that reasoning is inappropriately applied in the present case. As a result, notwithstanding the sweeping legal principles set out in the majority's opinion, the decision of this case ultimately rests on the mundane application of clear law to undisputed facts. The majority suggests that the New York court wrongly applied its law because the affidavits described more than excerpted scenes: they allowed the Magistrate to discern the "'general theme and serious value'" of the films, and established that sex acts "'pervaded'" each film. *Ante*, at 877.

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[2] Obscene material, considered as a whole, must not only be without serious literary or other merit, but it must, applying contemporary community standards, also appeal predominantly to a "shameful or morbid" interest in sex. See *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491 (1985). Indeed, three of the very films described by the affidavits in this case have been declared outside the constitutional boundaries of obscenity. See *United States* v. *Various Articles of Obscene Merchandise*, 709 F. 2d 132 (CA2 1983) ("Deep Throat," "Debbie Does Dallas," and "Little Girls Blue" not obscene, applying community standards of Southern District of New York).

The problem with the majority's approach is that it is unsupported in the texts of the affidavits. Although a boilerplate sentence in each affidavit invokes the "content" of the films, and two of the affidavits conclusorily assert that certain sex acts are depicted "throughout" the film, the affidavits do not attempt to describe every scene in the films or even most of the scenes. Rather, the scenes described in the affidavits are simply those the author chose to describe. While descriptions of sex acts pervade the *affidavits*, it is hardly clear that depictions of sex acts pervade the *films*. Similarly, while the "general tone" of the affidavits is clear, we have little basis for a conclusion about the "general tone" of the films.

The affidavits do not purport to be exhaustive. They can be meaningful in considering the artistic value of the films, taken as a whole, or the films' predominant appeal, only if one assumes that everything, or almost everything, worth noting in the films was incorporated into the affidavits. Nothing in the affidavits, however, justifies that assumption. The affidavits are precisely what the New York Court of Appeals condemned: mere listings of selected scenes from the films that involved depictions of sex. The films described could as well be "Last Tango in Paris."

The majority's decision upholding a warrant authorization uninformed by any information relating to crucial elements of the definition of obscenity is especially incongruous because the majority overrules the institution most closely attuned to the content of those elements: the New York courts. The New York courts are well suited to decide whether, on the basis of "contemporary community standards," the information supporting a warrant authorization allows the magistrate to focus searchingly on the question of obscenity, and to find probable cause that given material is obscene. The New York courts have unanimously held in this case that the affidavits were insufficient to achieve that end. The majority's eagerness to reverse that fact-bound determination in order to expedite an obscenity prosecution is inappropriate and reflects a dubious notion of this Court's institutional role. Cf. *California* v. *Carney*, 471 U. S. 386, 395 (1985) (STEVENS, J., dissenting).

I dissent.

REPORTER'S NOTE

The next page is purposely numbered 1001. The numbers between 889 and 1001 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM FEBRUARY 24 THROUGH APRIL 28, 1986

FEBRUARY 24, 1986

Affirmed on Appeal

No. 85-1090. HUDNUT, MAYOR OF CITY OF INDIANAPOLIS, INDIANA, ET AL. *v.* AMERICAN BOOKSELLERS ASSN., INC., ET AL. Affirmed on appeal from C. A. 7th Cir. THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR would note probable jurisdiction and set case for oral argument. Reported below: 771 F. 2d 323.

Appeals Dismissed

No. 85-979. SVENDROWSKI *v.* MISSOURI. Appeal from Ct. App. Mo., Eastern Dist., dismissed for want of substantial federal question. Reported below: 692 S. W. 2d 348.

No. 85-1080. SAN DIEGO GAS & ELECTRIC CO. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA. Appeal from Sup. Ct. Cal. dismissed for want of substantial federal question.

No. 85-1091. LEONI ET AL. *v.* STATE BAR OF CALIFORNIA. Appeal from Sup. Ct. Cal. dismissed for want of substantial federal question. Reported below: 39 Cal. 3d 609, 704 P. 2d 183.

No. 85-1232. STAMOS, INDIVIDUALLY AND AS NEXT FRIEND OF STAMOS, A MINOR, ET AL. *v.* SPRING BRANCH INDEPENDENT SCHOOL DISTRICT ET AL. Appeal from Sup. Ct. Tex. dismissed for want of substantial federal question. Reported below: 695 S. W. 2d 556.

No. 85-1035. CROCKER NATIONAL BANK *v.* PERDUE. Appeal from Sup. Ct. Cal. dismissed for want of jurisdiction. Reported below: 38 Cal. 3d 913, 702 P. 2d 503.

No. 85-1040. KERNER *v.* JUDGES OF THE WORCESTER PROBATE COURT ET AL. Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85–1113. CARTER *v.* VIRGINIA. Appeal from Sup. Ct. Va. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85–5931. DYSON *v.* TEXAS. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85–5947. STEVENSON *v.* LEGAL AID SOCIETY OF HAWAII. Appeal from Int. Ct. App. Haw. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: —— Haw. App. ——, 753 P. 2d 252.

No. 85–6001. DOOLEY *v.* BELCHER. Appeal from Ct. App. Ohio, Montgomery County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85–6002. DOOLEY *v.* FEDERAL HOME LOAN MORTGAGE CORPORATION ET AL. Appeal from Ct. App. Ohio, Montgomery County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85–1050. TRAHAN *v.* TRAHAN. Appeal from Ct. App. Tex., 3d Sup. Jud. Dist., dismissed for want of substantial federal question. JUSTICE WHITE would postpone further consideration of question of jurisdiction to a hearing of the case on the merits. Reported below: 682 S. W. 2d 332.

No. 85–5650. TAYLOR *v.* ROBINSON, WARDEN. Appeal from Sup. Ct. Conn. dismissed for want of substantial federal question. JUSTICE WHITE, JUSTICE POWELL, and JUSTICE O'CONNOR would note probable jurisdiction and set case for oral argument. Reported below: 196 Conn. 572, 494 A. 2d 1195.

Vacated and Remanded on Appeal

No. 85–182. NORTHWEST CENTRAL PIPELINE CORP. ET AL. *v.* CORPORATION COMMISSION OF KANSAS ET AL. Appeal from Sup. Ct. Kan. Judgment vacated and case remanded for further consideration in light of *Transcontinental Gas Pipe Line Corp.* v. *State Oil and Gas Board*, 474 U. S. 409 (1986). Reported below: 237 Kan. 248, 699 P. 2d 1002.

Certiorari Granted—Vacated and Remanded

No. 84-1237. THIGPEN, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL. *v.* JONES. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Cabana* v. *Bullock*, 474 U. S. 376 (1986). Reported below: 741 F. 2d 805.

Miscellaneous Orders

No. — — —. AGEE ET AL. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; and

No. — — —. VESSICHIO *v.* CONNECTICUT. Motions of petitioners to direct the Clerk to file petitions for writs of certiorari that do not comply with the Rules of this Court denied.

No. — — —. ANDREWS *v.* CALIFORNIA COOLER, INC. Motion of petitioner to direct the Clerk to file a petition for writ of certiorari out of time and for relief from the requirement of Rule 28.2 denied.

No. D-445. IN RE DISBARMENT OF NICHOLAS. Disbarment entered. [For earlier order herein, see 468 U. S. 1223.]

No. D-524. IN RE DISBARMENT OF WETHERBEE. Disbarment entered. JUSTICE STEVENS dissents. [For earlier order herein, see 474 U. S. 897.]

No. D-535. IN RE DISBARMENT OF ROMANO. Salvatore L. Romano, Jr., of Providence, R. I., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on December 9, 1985 [474 U. S. 1017], is hereby discharged.

No. D-544. IN RE DISBARMENT OF TILLEY. It is ordered that Kenneth L. Tilley, of Houston, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-545. IN RE DISBARMENT OF WILLIS. It is ordered that David A. Willis, of Valparaiso, Ind., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-546. In re Disbarment of August. It is ordered that Irving A. August, of Birmingham, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 65, Orig. Texas *v.* New Mexico. Motion of the Special Master for allowance of interim fees and disbursements granted and a total of $34,213.09 is allowed. [For earlier order herein, see, *e. g.*, 468 U. S. 1202.]

Chief Justice Burger, with whom Justice Blackmun and Justice Rehnquist join, dissenting.

In *Louisiana* v. *Mississippi*, 466 U. S. 921 (1984), I dissented from an order of the Court granting fees to the Special Master. The basis for my dissent was that the hourly rates at which the Special Master sought fees for work performed by his junior associates, some of whom were only "summer law clerks," were not supported and were unreasonable.

In the present case, the Special Master (who also sat in the *Louisiana* case) has applied for interim fees in the amount of $33,511. I dissent because the Special Master has elected to give the Court even less information supporting the fee request than he did in *Louisiana*. The Special Master omits any information concerning the experience levels of the four attorneys for whose services he seeks to charge. (I assume, although it is not so stated, that they are in fact members of the bar, for I cannot believe such a claim would be made for services of any persons not admitted to practice.) We are not informed as to the hourly rates charged for his work and the work of those attorneys. Instead, we are provided only with enough information to conclude that the average hourly rate charged by the attorneys is $140 per hour. The Court and the parties are thus necessarily left to speculate as to whether that average reflects a charge in excess of $100 per hour for work performed only by junior associates.

As I noted in *Louisiana*,

> "[t]he fees and expenses charged by a Special Master when allowed by this Court, represent our assurance to the parties that the charges are reasonable and proper." *Id.*, at 923.

This applies with equal force where, as here, the parties do not oppose the application. The present application for *interim* fees is made by an adjudicator who has yet to adjudicate. I draw no inferences, affirmative or negative, from the fact that the parties have elected not to express their views concerning the Special Master's application.

However, in dissenting in *Louisiana*, I stated:

> "A Special Master of this Court is a surrogate of the Court and in that sense the service performed is an important public duty of high order in much the same way as is serving in the Judiciary. I do not suggest that Special Masters should serve without compensation, as for example, Senior Federal Judges have done for a number of years in such cases, but I believe the public service aspect of the appointment is a factor that is not to be wholly ignored in determining the reasonableness of fees charged in a case like this." *Id.*, at 921.

Even if the public service aspect of the function of a Special Master of this Court should not enter into the fixing of fees, I am unwilling to act without being provided with at least as much information as private clients routinely receive from their privately retained counsel. The contending litigants have a right to expect this Court to exercise its independent judgment on fees rather than requiring each or both of them to challenge the amounts.

I would defer action on the application for interim fees until adequate information is provided. Without such data, this Court cannot protect the legitimate public interests implicated.

No. 84–902. WARDAIR CANADA INC. *v.* FLORIDA DEPARTMENT OF REVENUE. Sup. Ct. Fla. [Probable jurisdiction noted, 474 U. S. 943.] Motion of National Governors' Association et al. for leave to file a brief as *amici curiae* granted.

No. 84–1905. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* OWENS ET AL. D. C. C. D. Cal. [Probable jurisdiction noted *sub nom. Heckler* v. *Owens*, 474 U. S. 899.] Motion of appellee Buenta Owens to be substituted as representative of appellee Kenneth Owens, deceased, granted.

No. 85–93. BAZEMORE ET AL. *v.* FRIDAY ET AL.; and

No. 85–428. UNITED STATES ET AL. *v.* FRIDAY ET AL. C. A. 4th Cir. [Certiorari granted, 474 U. S. 978.] Motion of respondents for divided argument denied. JUSTICE BRENNAN would grant this motion.

No. 85-117. BAKER ET AL. *v.* GENERAL MOTORS CORP. ET AL. Sup. Ct. Mich. [Probable jurisdiction noted, 474 U. S. 899.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 85-227. SMALIS ET AL. *v.* PENNSYLVANIA. Sup. Ct. Pa. [Certiorari granted, 474 U. S. 944.] Motion of petitioners for divided argument denied. JUSTICE BRENNAN would grant this motion.

No. 85-236. EICHENLAUB *v.* YURKY ET AL. C. A. 3d Cir. [Certiorari granted, 474 U. S. 1049.] Motion for appointment of counsel granted, and it is ordered that David Rudovsky, Esquire, of Philadelphia, Pa., be appointed to serve as counsel for respondent David A. Yurky in this case.

No. 85-372. CHRISTENSEN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioners to consolidate this case with No. 85-546, *United States* v. *Mottaz* [certiorari granted, 474 U. S. 994], denied.

No. 85-437. ARCARA, DISTRICT ATTORNEY OF ERIE COUNTY *v.* CLOUD BOOKS, INC., DBA VILLAGE BOOK & NEWS STORE, ET AL. Ct. App. N. Y. [Certiorari granted, 474 U. S. 978.] Motion of American Civil Liberties Union et al. for leave to file a brief as *amici curiae* granted.

No. 85-519. RANDALL ET AL. *v.* LOFTSGAARDEN ET AL. C. A. 8th Cir. [Certiorari granted, 474 U. S. 978.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 85-530. O'CONNOR ET AL. *v.* ORTEGA. C. A. 9th Cir. [Certiorari granted, 474 U. S. 1018.] Joel I. Klein, Esquire, of Washington, D. C., a member of the Bar of this Court, is invited to brief and argue this case as *amicus curiae* in support of the judgment below.

No. 85-558. O'CONNOR ET UX. *v.* UNITED STATES;
No. 85-559. COPLIN ET UX. *v.* UNITED STATES; and
No. 85-560. MATTOX ET UX. *v.* UNITED STATES. C. A. Fed. Cir. [Certiorari granted, 474 U. S. 1050.] Motion of petitioners to dispense with printing the joint appendix granted.

No. 85-568. NANTAHALA POWER & LIGHT CO. ET AL. *v.* THORNBURG, ATTORNEY GENERAL OF NORTH CAROLINA, ET AL.

Sup. Ct. N. C. [Probable jurisdiction noted, 474 U. S. 1018.] Motions of Edison Electric Institute and New England Electric System for leave to file briefs as *amici curiae* granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of appellees for divided argument denied. JUSTICE BRENNAN would grant this motion. JUSTICE POWELL took no part in the consideration or decision of these motions.

No. 85–621. COMMODITY FUTURES TRADING COMMISSION *v.* SCHOR ET AL.; and

No. 85–642. CONTICOMMODITY SERVICES, INC. *v.* SCHOR ET AL. C. A. D. C. Cir. [Certiorari granted, 474 U. S. 1018.] Motion of petitioner ContiCommodity Services, Inc., for divided argument granted. Motion of respondents for divided argument denied. JUSTICE BRENNAN would grant this motion.

No. 85–632. ATKINS, COMMISSIONER, MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE *v.* RIVERA ET AL. Sup. Jud. Ct. Mass. [Certiorari granted, 474 U. S. 1018.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 85–905. SALISBURY *v.* JAMES RIVER CORP. ET AL., 474 U. S. 1061. Motion of United Paperworkers International Union for damages and fees denied.

No. 85–954. JAPAN WHALING ASSN. ET AL. *v.* AMERICAN CETACEAN SOCIETY ET AL.; and

No. 85–955. BALDRIGE, SECRETARY OF COMMERCE, ET AL. *v.* AMERICAN CETACEAN SOCIETY ET AL. C. A. D. C. Cir. [Certiorari granted, 474 U. S. 1053.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 85–1030. RADOL ET AL. *v.* THOMAS ET AL. C. A. 6th Cir.;

No. 85–1043. PILOT LIFE INSURANCE CO. *v.* DEDEAUX. C. A. 5th Cir.; and

No. 85–1066. MARTIN, GOVERNOR OF NORTH CAROLINA, ET AL. *v.* HAITH. Appeal from D. C. E. D. N. C. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 85–5542. FORD *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. [Certiorari granted, 474 U. S. 1019.] Motions of American Psychological Association et al., Office of the Capital Collateral Representative for Florida et al., and American Psychiatric Association for leave to file briefs as *amici curiae* granted.

No. 85-5699. WILSON *v.* SCHILLINGER ET AL. C. A. 3d Cir. Motion of petitioner to grant the petition for writ of certiorari, vacate the judgment, and remand the case to the United States Court of Appeals for the Third Circuit for further consideration denied.

No. 85-6233. SHEWCHUN *v.* UNITED STATES. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until March 17, 1986, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 85-851. IN RE CARSON. C. A. 6th Cir. Petition for writ of common-law certiorari and/or mandamus denied.

No. 85-6142. IN RE JOHNSON. Petition for writ of habeas corpus denied.

No. 85-5921. IN RE MURPHY; and
No. 85-6090. IN RE BRAATEN. Petitions for writs of mandamus denied.

No. 85-5971. IN RE BARRITT. Petition for writ of mandamus and/or prohibition denied.

No. 85-6141. IN RE GREEN. Petition for writ of prohibition and/or mandamus denied.

Probable Jurisdiction Noted or Postponed

No. 85-732. WESTERN AIR LINES, INC., ET AL. *v.* BOARD OF EQUALIZATION OF THE STATE OF SOUTH DAKOTA ET AL. Appeal from Sup. Ct. S. D. Probable jurisdiction noted. Reported below: 372 N. W. 2d 106.

No. 85-1377. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES *v.* SYNAR, MEMBER OF CONGRESS, ET AL.;

No. 85-1378. UNITED STATES SENATE *v.* SYNAR, MEMBER OF CONGRESS, ET AL.; and

No. 85-1379. O'NEILL, SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL. *v.* SYNAR, MEMBER OF CONGRESS, ET AL. Appeals from D. C. D. C. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted each side for oral argument. Motion of the parties to dispense temporarily with printing and to set an expedited briefing schedule and argument date granted. Reported below: 626 F. Supp. 1374.

No. 85-1021. R. J. REYNOLDS TOBACCO CO. *v.* DURHAM COUNTY, NORTH CAROLINA, ET AL. Appeal from Sup. Ct. N. C.; and

No. 85-1022. R. J. REYNOLDS TOBACCO CO. *v.* DURHAM COUNTY, NORTH CAROLINA, ET AL. Appeal from Ct. App. N. C. Further consideration of question of jurisdiction postponed to hearing of cases on the merits. Cases consolidated and a total of one hour allotted for oral argument. Reported below: No. 85-1021, 314 N. C. 540, 335 S. E. 2d 21; No. 85-1022, 73 N. C. App. 475, 326 S. E. 2d 911.

Certiorari Granted

No. 85-782. IMMIGRATION AND NATURALIZATION SERVICE *v.* CARDOZA-FONSECA. C. A. 9th Cir. Certiorari granted. Reported below: 767 F. 2d 1448.

No. 85-1033. KELLY, CONNECTICUT CHIEF STATE'S ATTORNEY, ET AL. *v.* ROBINSON. C. A. 2d Cir. Certiorari granted. Reported below: 776 F. 2d 30.

No. 85-686. METROPOLITAN LIFE INSURANCE CO. *v.* TAYLOR; and

No. 85-688. GENERAL MOTORS CORP. *v.* TAYLOR. C. A. 6th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 763 F. 2d 216.

No. 85-759. MARYLAND *v.* GARRISON. Ct. App. Md. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 303 Md. 385, 494 A. 2d 193.

No. 85-937. WEST VIRGINIA *v.* UNITED STATES. C. A. 4th Cir. Certiorari granted limited to Question 2 presented by the petition. Reported below: 764 F. 2d 1028.

No. 84-6075. TISON *v.* ARIZONA (two cases). Sup. Ct. Ariz. Motions of petitioners for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 142 Ariz. 446, 690 P. 2d 747 (first case); 142 Ariz. 454, 690 P. 2d 755 (second case).

No. 85-5454. GRAY *v.* MISSISSIPPI. Sup. Ct. Miss. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 472 So. 2d 409.

Certiorari Denied. (See also Nos. 85-1040, 85-1113, 85-5931, 85-5947, 85-6001, 85-6002, and 85-851, *supra.*)

No. 84-1692. BIBBY *v.* UNITED STATES; and

No. 84-1851. GILLOCK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 752 F. 2d 1116.

No. 85-125. WALTON ET AL. *v.* COLVILLE CONFEDERATED TRIBES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 752 F. 2d 397 and 758 F. 2d 1324.

No. 85-591. W. C. GARCIA & ASSOCIATES, INC. *v.* SASSI, DISTRICT DIRECTOR, INTERNAL REVENUE SERVICE. C. A. 9th Cir. Certiorari denied.

No. 85-596. ARNSBERG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 757 F. 2d 971.

No. 85-670. ETHYL CORP. *v.* UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 768 F. 2d 180.

No. 85-708. ALL SOULS EPISCOPAL CHURCH *v.* FEDERAL DEPOSIT INSURANCE CORPORATION ET AL.; and

No. 85-1017. ROCKET OIL CO. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 769 F. 2d 658.

No. 85-713. BEERLY, TRUSTEE OF THE GUSTAV E. BEERLY TRUST *v.* DEPARTMENT OF THE TREASURY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 768 F. 2d 942.

No. 85-728. CARR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 764 F. 2d 496.

No. 85-746. ALBANO ET AL. *v.* CRAIG CORP. C. A. 7th Cir. Certiorari denied. Reported below: 767 F. 2d 924.

No. 85-758. City of Prior Lake, Minnesota *v.* Shakopee Mdewakanton Sioux Community et al. C. A. 8th Cir. Certiorari denied. Reported below: 771 F. 2d 1153.

No. 85-775. Mastropaolo *v.* Mastropaolo. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 166 Cal. App. 3d 953, 213 Cal. Rptr. 26.

No. 85-796. American Financial Services Assn. *v.* Federal Trade Commission et al.; and

No. 85-797. South Carolina Department of Consumer Affairs *v.* Federal Trade Commission et al. C. A. D. C. Cir. Certiorari denied. Reported below: 247 U. S. App. D. C. 167, 767 F. 2d 957.

No. 85-821. Florida Department of Business Regulation et al. *v.* United States Department of the Interior et al. C. A. 11th Cir. Certiorari denied. Reported below: 768 F. 2d 1248.

No. 85-822. Amoco Production Co. *v.* Equal Employment Opportunity Commission. C. A. 5th Cir. Certiorari denied. Reported below: 768 F. 2d 669.

No. 85-840. Ginsburg *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 773 F. 2d 798.

No. 85-843. Long *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 774 F. 2d 1164.

No. 85-850. Purvis et al. *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 768 F. 2d 1237.

No. 85-854. Esposito et al. *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 771 F. 2d 283.

No. 85-857. Simmons *v.* United States. Ct. Mil. App. Certiorari denied. Reported below: 21 M. J. 38.

No. 85-861. Haddon House Food Products, Inc., et al. *v.* National Labor Relations Board et al. C. A. 3d Cir. Certiorari denied. Reported below: 764 F. 2d 182.

No. 85-867. Hodges *v.* Department of Transportation, Federal Aviation Administration. C. A. Fed. Cir. Certiorari denied. Reported below: 776 F. 2d 1061.

No. 85–876. Vicars *v.* Superior Court of California, County of Alameda (Eppler et al., Real Parties in Interest). Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 85–884. Banks et al. *v.* Pan American World Airways, Inc., et al. C. A. 11th Cir. Certiorari denied. Reported below: 763 F. 2d 1399.

No. 85–897. Kowalchuk *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 773 F. 2d 488.

No. 85–904. Herford *v.* Sun Pipe Line Co. C. A. 5th Cir. Certiorari denied. Reported below: 770 F. 2d 163.

No. 85–907. Fromm et al. *v.* Rosewell, Treasurer of Cook County, Illinois, et al. C. A. 7th Cir. Certiorari denied. Reported below: 771 F. 2d 1089.

No. 85–924. Murphy *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 768 F. 2d 1518.

No. 85–927. Shokrian *v.* Carroll, Superintendent of Prisons, Department of Corrections of California. C. A. 9th Cir. Certiorari denied. Reported below: 774 F. 2d 1175.

No. 85–930. Chambless et ux. *v.* Masters, Mates & Pilots Pension Plan et al.; and
No. 85–1097. Masters, Mates & Pilots Pension Plan et al. *v.* Chambless et ux. C. A. 2d Cir. Certiorari denied. Reported below: 772 F. 2d 1032.

No. 85–935. Jones *v.* Illinois. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 129 Ill. App. 3d 618, 472 N. E. 2d 1176.

No. 85–938. Ross *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 132 Ill. App. 3d 498, 477 N. E. 2d 1258.

No. 85–940. De Luca *v.* New York. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 110 App. Div. 2d 1091, 488 N. Y. S. 2d 529.

No. 85–942. Fern *v.* Fern. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 85–950. Marchant *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 774 F. 2d 888.

No. 85–956. Clopton *v.* City of Dallas. C. A. 5th Cir. Certiorari denied. Reported below: 773 F. 2d 1235.

No. 85–959. Township of Lacey *v.* Jersey Central Power & Light Co. C. A. 3d Cir. Certiorari denied. Reported below: 772 F. 2d 1103.

No. 85–964. Libertarian Party of Virginia et al. *v.* Davis et al. C. A. 4th Cir. Certiorari denied. Reported below: 766 F. 2d 865.

No. 85–975. Ross Bicycles, Inc. *v.* Cycles USA, Inc. C. A. 11th Cir. Certiorari denied. Reported below: 765 F. 2d 1502.

No. 85–978. Korey *v.* City of Davenport, Iowa. C. A. 8th Cir. Certiorari denied. Reported below: 774 F. 2d 1170.

No. 85–980. Ernest *v.* United States Attorney for the Southern District of Alabama et al. C. A. 11th Cir. Certiorari denied. Reported below: 770 F. 2d 1082.

No. 85–982. Sampson *v.* Raskin et al. C. A. 7th Cir. Certiorari denied. Reported below: 767 F. 2d 925.

No. 85–984. International Association of Machinists & Aerospace Workers, AFL–CIO *v.* Qantas Airways, Ltd. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 912.

No. 85–985. Masin et ux. *v.* Drain et ux. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 85–986. Gissaro *v.* Gross & Hecht Trucking, Inc. Super. Ct. N. J., App. Div. Certiorari denied.

No. 85–989. Quilici *v.* Second Amendment Foundation et al. C. A. 7th Cir. Certiorari denied. Reported below: 769 F. 2d 414.

No. 85–992. Freese, Next Friend for Freese, et ux. *v.* Corning Glass Works. C. A. 6th Cir. Certiorari denied. Reported below: 770 F. 2d 165.

No. 85–1000. Facer Insurance Agency, Inc. *v.* Fabe, Superintendent of Insurance of Ohio. C. A. 7th Cir. Certiorari denied. Reported below: 773 F. 2d 142.

No. 85-1001. BOHN ET UX. *v.* COUNTY OF DAKOTA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 772 F. 2d 1433.

No. 85-1002. CIAMPITTI ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 772 F. 2d 893.

No. 85-1004. BEAIRD *v.* MILLER'S MUTUAL INSURANCE ASSOCIATION OF ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 133 Ill. App. 3d 670, 479 N. E. 2d 374.

No. 85-1006. SINHA *v.* VETERANS ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 768 F. 2d 330.

No. 85-1008. BRITT *v.* SIMI VALLEY UNIFIED SCHOOL DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 776 F. 2d 1052.

No. 85-1009. YARBOUGH ET AL. *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 100 N. J. 627, 498 A. 2d 1239.

No. 85-1013. RITTENHOUSE *v.* DEKALB COUNTY, GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 764 F. 2d 1451.

No. 85-1014. SMITH *v.* LOUISIANA. Ct. App. La., 2d Cir. Certiorari denied.

No. 85-1015. LEEBRO MANAGEMENT, INC., DBA SAMSON BUICK, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 772 F. 2d 895.

No. 85-1016. MCKNIGHT ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 771 F. 2d 388.

No. 85-1019. RUSSELL *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 85-1023. JON-T. CHEMICALS, INC., ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 768 F. 2d 686.

No. 85-1024. PLISKA *v.* STEEL KING INDUSTRIES, INC. C. A. 7th Cir. Certiorari denied. Reported below: 774 F. 2d 1168.

No. 85–1025. WILLIAMS, T/A WILLIAMS ELECTRIC *v.* SCHOOL BOARD OF THE CITY OF PITTSBURGH. C. A. 3d Cir. Certiorari denied. Reported below: 772 F. 2d 897.

No. 85–1029. STARKMAN *v.* MARATHON OIL CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 772 F. 2d 231.

No. 85–1031. HUCKS ET AL. *v.* BELL TELEPHONE LABORATORIES, INC. C. A. 4th Cir. Certiorari denied. Reported below: 760 F. 2d 265.

No. 85–1032. M. J. M. EXHIBITORS, INC. *v.* STERN, INDIVIDUALLY AND AS CHAIRMAN OF THE NEW YORK STATE URBAN DEVELOPMENT CORPORATION, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 770 F. 2d 288.

No. 85–1034. JACKSON *v.* CABINET FOR HUMAN RESOURCES OF THE COMMONWEALTH OF KENTUCKY. C. A. 6th Cir. Certiorari denied. Reported below: 774 F. 2d 1162.

No. 85–1039. QUANSAH *v.* JIM BUTLER & CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 913.

No. 85–1041. LLANO, INC. *v.* INTERNATIONAL MINERALS & CHEMICAL CORP. C. A. 10th Cir. Certiorari denied. Reported below: 770 F. 2d 879.

No. 85–1044. QUARLES *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 85–1046. RAMIREZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 769 F. 2d 453.

No. 85–1047. MIKULEC *v.* BRAUN, SHERIFF OF ERIE COUNTY. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 112 App. Div. 2d 803, 492 N. Y. S. 2d 305.

No. 85–1049. CHRYSLER PLASTIC PRODUCTS CORP. *v.* EREBIA. C. A. 6th Cir. Certiorari denied. Reported below: 772 F. 2d 1250.

No. 85–1055. PYLE, BY STRAUB, A SUCCESSOR GUARDIAN OF HER ESTATE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 766 F. 2d 1141.

No. 85–1056. BISCAYNE 21 CONDOMINIUM, INC. *v.* SOUTH ATLANTIC FINANCIAL CORP. C. A. 11th Cir. Certiorari denied. Reported below: 767 F. 2d 814.

No. 85-1057. OTARI CORP. *v.* KING INSTRUMENT CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 767 F. 2d 853.

No. 85-1059. DOE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 775 F. 2d 300.

No. 85-1060. RAYTHEON CO. *v.* CVD, INC., ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 769 F. 2d 842.

No. 85-1062. HORNBUCKLE *v.* ARCO OIL & GAS CO. C. A. 5th Cir. Certiorari denied. Reported below: 770 F. 2d 1321.

No. 85-1068. DEMJANJUK *v.* PETROVSKY, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 776 F. 2d 571.

No. 85-1069. COE *v.* COE. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1068.

No. 85-1070. JONES ET AL. *v.* THORNE; and
No. 85-5961. THORNE ET UX. *v.* JONES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 765 F. 2d 1270.

No. 85-1072. ANGEL *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO (RENN, REAL PARTY IN INTEREST). Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 85-1073. BLUE BELL, INC. *v.* WILHELM ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 773 F. 2d 1429.

No. 85-1075. DANIEL *v.* SECURITY PACIFIC NATIONAL BANK ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 771 F. 2d 1352.

No. 85-1076. LYONS, GUARDIAN OF THE PERSON AND ESTATE OF WHITTINGTON, A MINOR *v.* BUTE, CONSERVATOR OF THE ESTATE OF WHITTINGTON, ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 107 Ill. 2d 169, 483 N. E. 2d 210.

No. 85-1078. BERNSTEIN *v.* PORTLAND SAVINGS & LOAN ASSN. Ct. App. Tex., 13th Sup. Jud. Dist. Certiorari denied. Reported below: 716 S. W. 2d 532.

No. 85-1086. RODRIGUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 770 F. 2d 959.

No. 85-1087. HOLMES *v.* DRUMMOND. Sup. Ct. Del. Certiorari denied. Reported below: 504 A. 2d 572.

No. 85-1089. GALLO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 763 F. 2d 1504.

No. 85-1101. BURBANK-GLENDALE-PASADENA AIRPORT AUTHORITY *v.* BAKER ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 39 Cal. 3d 862, 705 P. 2d 866.

No. 85-1102. MANN *v.* WARDEN, EGLIN AIR FORCE BASE. C. A. 11th Cir. Certiorari denied. Reported below: 771 F. 2d 1453.

No. 85-1103. CHALUISSANT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 779 F. 2d 44.

No. 85-1106. SHANDLOFF ET AL. *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 170 Cal. App. 3d 372, 215 Cal. Rptr. 916.

No. 85-1107. INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18, ET AL. *v.* MURPHY. C. A. 6th Cir. Certiorari denied. Reported below: 774 F. 2d 114.

No. 85-1108. DELTA RESINS & REFRACTORIES, INC., ET AL. *v.* ASHLAND OIL, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 776 F. 2d 281.

No. 85-1110. CARRALERO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 777 F. 2d 702.

No. 85-1111. POWELL PRESSED STEEL CO. *v.* POLICY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 770 F. 2d 609.

No. 85-1112. FALSTAFF BREWING CORP. *v.* TRINITY CARTON CO., INC. C. A. 5th Cir. Certiorari denied. Reported below: 767 F. 2d 184.

No. 85-1114. EARNEST *v.* LOUISIANA. 15th Jud. Dist. Ct. La., Lafayette Parish. Certiorari denied.

No. 85-1115. MOATS *v.* WICK, DIRECTOR, UNITED STATES INFORMATION AGENCY, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 85-1119. MARKOWSKI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 772 F. 2d 358.

No. 85-1123. TAYLOR *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 767 F. 2d 930.

No. 85-1124. CHRISTENSEN *v.* UNITED STATES (two cases). C. A. 10th Cir. Certiorari denied.

No. 85-1125. PRYOR *v.* PRYOR. Ct. App. Okla. Certiorari denied.

No. 85-1127. KING *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 762 F. 2d 232.

No. 85-1128. HALE ET UX. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 774 F. 2d 1164.

No. 85-1130. HAMILTON ET AL. *v.* ALDAG, TOWN CLERK FOR LOS GATOS (FERRITO ET AL., REAL PARTIES IN INTEREST). Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 85-1132. ROSENTHAL & ROSENTHAL INC. ET AL. *v.* NEW YORK STATE URBAN DEVELOPMENT CORPORATION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 771 F. 2d 44.

No. 85-1134. FIRST UNITED FUND, LTD. *v.* BROCKTON SAVINGS BANK. C. A. 1st Cir. Certiorari denied. Reported below: 771 F. 2d 5.

No. 85-1135. FLOYD *v.* HAIG ET AL. C. A. 4th Cir. Certiorari denied.

No. 85-1136. WINSLOW *v.* BOARD OF COUNTY COMMISSIONERS OF MORGAN COUNTY, COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 706 P. 2d 792.

No. 85-1137. ELSTON ET AL. *v.* BOARD OF LEVEE COMMISSIONERS OF THE ORLEANS LEVEE DISTRICT ET AL. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 469 So. 2d 1022.

No. 85-1139. AMERICAN VELODUR METAL, INC. *v.* SCHINABECK. App. Ct. Mass. Certiorari denied. Reported below: 20 Mass. App. 460, 481 N. E. 2d 209.

No. 85–1143. WALLACE *v.* DEPARTMENT OF THE ARMY. C. A. Fed. Cir. Certiorari denied. Reported below: 785 F. 2d 321.

No. 85–1144. SISTRUNK ET AL. *v.* CIRCLE BAR DRILLING CO. C. A. 5th Cir. Certiorari denied. Reported below: 770 F. 2d 455.

No. 85–1147. RADIATION TECHNOLOGY, INC. *v.* NEUTRON PRODUCTS, INC., ET AL. C. A. 4th Cir. Certiorari denied.

No. 85–1149. BRODKA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 775 F. 2d 303.

No. 85–1156. SPALLATO, ADMINISTRATOR OF THE ESTATE OF SPALLATO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 776 F. 2d 1050.

No. 85–1157. HILLTOP REALTY, INC. *v.* CITY OF CLEVELAND HEIGHTS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 774 F. 2d 135.

No. 85–1160. SINICROPI *v.* BENNETT, DEPUTY DIRECTOR OF PROBATION OF THE COUNTY OF NASSAU, ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 111 App. Div. 2d 801, 490 N. Y. S. 2d 1005.

No. 85–1161. DANIELS *v.* LOS ANGELES UNIFIED SCHOOL DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 774 F. 2d 1173.

No. 85–1162. DANIELS *v.* LOS ANGELES UNIFIED SCHOOL DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 774 F. 2d 1173.

No. 85–1163. SAMPLE ET AL. *v.* JOHNSON, DEPUTY COMMISSIONER FOR THE OFFICE OF WORKERS' COMPENSATION PROGRAMS FOR DISTRICT 14, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 771 F. 2d 1335.

No. 85–1175. REECE *v.* TENNESSEE CIVIL SERVICE COMMISSION. Ct. App. Tenn. Certiorari denied. Reported below: 699 S. W. 2d 808.

No. 85–1214. LANGELLA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 776 F. 2d 1078.

No. 85-1242. HALTER *v.* SECRETARY OF THE TREASURY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 911.

No. 85-1254. FERGUSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 776 F. 2d 217.

No. 85-5277. O'DRISCOLL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 761 F. 2d 589.

No. 85-5354. NORTH *v.* WEST VIRGINIA BOARD OF REGENTS. Sup. Ct. App. W. Va. Certiorari denied. Reported below: —— W. Va. ——, 332 S. E. 2d 141.

No. 85-5431. WALKER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 765 F. 2d 1122.

No. 85-5554. PREER *v.* JOHNSON, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 85-5595. DUEMMEL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 762 F. 2d 1022.

No. 85-5599. BARKLEY *v.* FULCOMER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON. C. A. 3d Cir. Certiorari denied.

No. 85-5661. GULOY *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 104 Wash. 2d 412, 705 P. 2d 1182.

No. 85-5676. BARKLEY *v.* FULCOMER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 85-5688. JONES *v.* AMERICAN POSTAL WORKERS UNION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 247 U. S. App. D. C. 148, 766 F. 2d 1566.

No. 85-5698. MARRERA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 768 F. 2d 201.

No. 85-5708. DAVIS *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 766 F. 2d 1197.

No. 85-5711. HUGHES *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 85–5714. SWEETWINE *v.* MARYLAND ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 769 F. 2d 991.

No. 85–5737. CLAUSEN *v.* TEXAS. Ct. App. Tex., 1st Sup. Jud. Dist. Certiorari denied. Reported below: 682 S. W. 2d 328.

No. 85–5739. HALLAHAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 768 F. 2d 754.

No. 85–5744. ANDERSON ET AL. *v.* MILLER, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 772 F. 2d 375.

No. 85–5760. SCHUSTER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 769 F. 2d 337.

No. 85–5762. NEWTON *v.* MCCOTTER MOTORS, INC., ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 475 So. 2d 230.

No. 85–5774. BROADWAY *v.* HULL, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 85–5780. WOODARD *v.* RASMUSSEN, WARDEN. Ct. App. Ore. Certiorari denied. Reported below: 73 Ore. App. 689, 700 P. 2d 675.

No. 85–5787. ANDERSON *v.* COLORADO. Sup. Ct. Colo. Certiorari denied.

No. 85–5790. VELASQUEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 772 F. 2d 1348.

No. 85–5792. WESTFALL *v.* HEDRICK, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 85–5794. POLK *v.* HENDERSON, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 37.

No. 85–5803. FREDERICK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 770 F. 2d 167.

No. 85–5805. FARRUGIA ET AL. *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 773 F. 2d 1237.

No. 85–5818. Beamon *v.* Wainwright, Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied. Reported below: 773 F. 2d 1238.

No. 85–5819. Clay *v.* Vose, Superintendent, Massachusetts Correctional Institution, Norfolk. C. A. 1st Cir. Certiorari denied. Reported below: 771 F. 2d 1.

No. 85–5822. Sharlow *v.* Young, Superintendent, Waupun Correctional Institution, et al. C. A. 7th Cir. Certiorari denied. Reported below: 767 F. 2d 373.

No. 85–5829. Mark *v.* McCotter, Director, Texas Department of Corrections. C. A. 5th Cir. Certiorari denied.

No. 85–5859. Glenn *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 131 Ill. App. 3d 1160, 493 N. E. 2d 1221.

No. 85–5865. Howard *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 770 F. 2d 57.

No. 85–5874. Marquez-Medina et al. *v.* Meese, Attorney General, et al. C. A. 11th Cir. Certiorari denied. Reported below: 766 F. 2d 1478.

No. 85–5902. Lucien *v.* Chrans, Warden; and
No. 85–5918. Lucien *v.* Chrans, Warden. C. A. 7th Cir. Certiorari denied.

No. 85–5906. Adams *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 772 F. 2d 908.

No. 85–5907. Lumbert *v.* DeRobertis, Warden. C. A. 7th Cir. Certiorari denied.

No. 85–5912. Price *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 774 F. 2d 1177.

No. 85–5914. Moore *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 772 F. 2d 827.

No. 85–5919. Crawford *v.* Ohio. Sup. Ct. Ohio. Certiorari denied.

No. 85–5922. Puta *v.* Commissioner of Internal Revenue. C. A. 7th Cir. Certiorari denied.

No. 85-5927. DENNIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 772 F. 2d 902.

No. 85-5932. BAGLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 482.

No. 85-5934. SULLIVAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 772 F. 2d 909.

No. 85-5937. DEPREE *v.* SOCIAL SECURITY ADMINISTRATION ET AL. C. A. 2d Cir. Certiorari denied.

No. 85-5943. KIRK *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: 699 S. W. 2d 814.

No. 85-5944. EVANS *v.* DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied.

No. 85-5948. BRYANT *v.* WARDEN, METROPOLITAN CORRECTIONAL CENTER OF NEW YORK CITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 776 F. 2d 394.

No. 85-5950. TRIPATI *v.* BROWN. C. A. 8th Cir. Certiorari denied. Reported below: 774 F. 2d 1172.

No. 85-5952. GISRIEL *v.* BOARD OF APPEALS, MARYLAND DEPARTMENT OF EMPLOYMENT AND TRAINING. Ct. Sp. App. Md. Certiorari denied. Reported below: 62 Md. App. 715.

No. 85-5953. BURTON *v.* SARGENT, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 85-5954. CARR *v.* WOODS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 776 F. 2d 1043.

No. 85-5955. ESSIX *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 475 So. 2d 694.

No. 85-5958. PARRIS *v.* HOLLOHAN, WARDEN, ET AL. Sup. Ct. Ariz. Certiorari denied.

No. 85-5960. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 771 F. 2d 79.

No. 85-5962. MILLER *v.* CAMPOY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 85-5964. Leventhal *v.* United States Department of Labor et al. C. A. 9th Cir. Certiorari denied. Reported below: 766 F. 2d 1351.

No. 85-5966. Harding *v.* Indiana. Sup. Ct. Ind. Certiorari denied. Reported below: 457 N. E. 2d 1098.

No. 85-5969. Kopp *v.* Social Security Administration. C. A. 3d Cir. Certiorari denied. Reported below: 772 F. 2d 895.

No. 85-5970. Gay *v.* Hernandez-Cuebas. C. A. 3d Cir. Certiorari denied.

No. 85-5974. Troutman *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 774 F. 2d 807.

No. 85-5975. Moore *v.* United States et al. C. A. 3d Cir. Certiorari denied.

No. 85-5976. Howard *v.* Wainwright, Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied. Reported below: 772 F. 2d 916.

No. 85-5977. Isley *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 767 F. 2d 914.

No. 85-5978. Clark *v.* State Treasurer's Office Employer et al. C. A. 4th Cir. Certiorari denied.

No. 85-5980. Hoelker *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 765 F. 2d 1422.

No. 85-5981. Haase *v.* Wisconsin. Ct. App. Wis. Certiorari denied. Reported below: 125 Wis. 2d 574, 373 N. W. 2d 86.

No. 85-5982. DePree *v.* Roberts, Commissioner of Labor of the City of New York. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied.

No. 85-5984. Callahan *v.* Johnson, Warden, et al. C. A. 11th Cir. Certiorari denied. Reported below: 770 F. 2d 173.

No. 85-5985. Kapp *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 780 F. 2d 1017.

No. 85-5992. Rubin *v.* Board of Governors of State Colleges and Universities (Western Illinois University). C. A. 7th Cir. Certiorari denied.

No. 85-5993. SIMMONS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 475 So. 2d 884.

No. 85-5994. SEWARD *v.* SAN LUIS OBISPO COUNTY DEPARTMENT OF SOCIAL SERVICES. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 85-5995. VILLAREAL *v.* STAGNER, SUPERINTENDENT, CORRECTIONAL TRAINING FACILITY. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 915.

No. 85-5996. ROSBERG *v.* DEUTSCHE CREDIT CORP. Sup. Ct. Neb. Certiorari denied. Reported below: 220 Neb. xxiii.

No. 85-5997. SPENCER *v.* DEVOE & REYNOLDS CO., INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 770 F. 2d 167.

No. 85-5998. RUNNELS *v.* KINGSTON ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 85-5999. STRYKER *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied.

No. 85-6003. HURLEY *v.* HONGISTO ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1438.

No. 85-6007. KRUMPELMAN *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied. Reported below: 767 F. 2d 586.

No. 85-6008. BRANCEWICZ *v.* LAMBIRIS ET AL. C. A. 3d Cir. Certiorari denied.

No. 85-6012. MUZA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 85-6013. WELLS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 64 Md. App. 719.

No. 85-6014. ROSBERG *v.* DEUTSCHE CREDIT CORP. C. A. 8th Cir. Certiorari denied.

No. 85-6015. WHITE *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 775 F. 2d 300.

No. 85-6016. FLITTIE *v.* SOLEM, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 775 F. 2d 933.

No. 85–6017. DALY *v.* BAILEY. Sup. Ct. Conn. Certiorari denied. Reported below: 198 Conn. 801, 501 A. 2d 758.

No. 85–6018. GLOVER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 39.

No. 85–6020. DEMOURA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 39.

No. 85–6021. DRAPER *v.* VIRGINIA DEPARTMENT OF CORRECTIONS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 774 F. 2d 1154.

No. 85–6023. TURNER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 2d 1508.

No. 85–6025. WELCH *v.* WOODARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 774 F. 2d 1156.

No. 85–6028. MARKS *v.* JOHNSON, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 85–6029. SHOOK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 779 F. 2d 53.

No. 85–6030. HOLMES *v.* HARDY ET AL. C. A. 5th Cir. Certiorari denied.

No. 85–6031. REED *v.* MANSON, COMMISSIONER OF CORRECTIONS OF CONNECTICUT, ET AL. C. A. 2d Cir. Certiorari denied.

No. 85–6032. NIVEN *v.* KAISER FOUNDATION HOSPITAL. C. A. 9th Cir. Certiorari denied. Reported below: 767 F. 2d 933.

No. 85–6036. HAASE *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 125 Wis. 2d 574, 373 N. W. 2d 87.

No. 85–6040. RICHARDS ET UX. *v.* SWINEBROAD & DENTON AUCTIONEERS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 770 F. 2d 167.

No. 85–6041. SPENCE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 780 F. 2d 1024.

No. 85–6042. VERSE *v.* FOLTZ, REGIONAL ADMINISTRATOR, MICHIGAN DEPARTMENT OF CORRECTIONS. C. A. 6th Cir. Certiorari denied. Reported below: 770 F. 2d 168.

No. 85-6043. Melvin *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied. Reported below: 706 P. 2d 163.

No. 85-6046. Hans *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 779 F. 2d 44.

No. 85-6047. Brown *v.* Wainwright, Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied. Reported below: 776 F. 2d 1056.

No. 85-6052. Augustyniak *v.* City of New York et al. Ct. App. N. Y. Certiorari denied. Reported below: 65 N. Y. 2d 922, 483 N. E. 2d 135.

No. 85-6053. Sayre *v.* Indiana. Ct. App. Ind. Certiorari denied. Reported below: 471 N. E. 2d 708.

No. 85-6054. Sanderson *v.* Rice, Warden, et al. C. A. 4th Cir. Certiorari denied. Reported below: 777 F. 2d 902.

No. 85-6056. Keller *v.* Salton. C. A. 3d Cir. Certiorari denied. Reported below: 772 F. 2d 895.

No. 85-6059. Glick *v.* Lockhart, Director, Arkansas Department of Correction. C. A. 8th Cir. Certiorari denied. Reported below: 782 F. 2d 1047.

No. 85-6061. Gillard *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 776 F. 2d 1055.

No. 85-6062. Raysor *v.* Port Authority of New York et al. C. A. 2d Cir. Certiorari denied. Reported below: 768 F. 2d 34.

No. 85-6066. Weser *v.* Carlin, Governor of Kansas. Sup. Ct. Kan. Certiorari denied.

No. 85-6067. Sallee *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 767 F. 2d 909.

No. 85-6068. Freeman *v.* McNamara, Director, North Carolina Division of Prisons, et al. C. A. 4th Cir. Certiorari denied. Reported below: 776 F. 2d 1043.

No. 85-6070. Fields *v.* Simmons et al. C. A. 11th Cir. Certiorari denied.

No. 85-6071. BLEVINS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 774 F. 2d 1178.

No. 85-6075. McDONALD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 776 F. 2d 1049.

No. 85-6076. FLETCHER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 85-6078. MUZA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 85-6079. SMITH *v.* WENZELMAN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 767 F. 2d 924.

No. 85-6081. LUCERO *v.* SNYDER. C. A. 10th Cir. Certiorari denied.

No. 85-6087. POOL *v.* BRACKMAN, JUDGE, ET AL. C. A. 8th Cir. Certiorari denied.

No. 85-6088. ALEEM *v.* CARR ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 85-6093. GEORGEVICH *v.* STRAUSS. C. A. 3d Cir. Certiorari denied. Reported below: 772 F. 2d 1078.

No. 85-6097. WALLACE *v.* TATE, SUPERINTENDENT, CHILLICOTHE CORRECTIONAL INSTITUTE. C. A. 6th Cir. Certiorari denied. Reported below: 774 F. 2d 1164.

No. 85-6099. RODMAN *v.* TATE, SUPERINTENDENT, CHILLICOTHE CORRECTIONAL INSTITUTE, ET AL. C. A. 6th Cir. Certiorari denied.

No. 85-6105. LEWIEL *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 132 Ill. App. 3d 1161, 494 N. E. 2d 959.

No. 85-6106. ANTHONY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 769 F. 2d 1544.

No. 85-6107. WYCOFF *v.* MENKE. C. A. 8th Cir. Certiorari denied. Reported below: 773 F. 2d 983.

No. 85-6110. WALTER *v.* TORRES ET AL. C. A. 5th Cir. Certiorari denied.

No. 85-6112. Ofarril *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 791.

No. 85-6113. Baker, aka Walker *v.* Alabama. Ct. Crim. App. Ala. Certiorari denied. Reported below: 477 So. 2d 496.

No. 85-6115. Butler *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 85-6116. Palafox *v.* Edwards, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 779 F. 2d 52.

No. 85-6121. Winterhalder *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 85-6129. Thomas *v.* McCotter, Director, Texas Department of Corrections. C. A. 5th Cir. Certiorari denied.

No. 85-6131. Barcena *v.* Washington, Mayor of City of Chicago, et al. Sup. Ct. Ill. Certiorari denied. Reported below: 108 Ill. 2d 555.

No. 85-6132. Boynton *v.* Florida. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 473 So. 2d 703.

No. 85-6133. Graf *v.* City of Oshkosh, Wisconsin. Ct. App. Wis. Certiorari denied.

No. 85-6143. Johnston *v.* Wilkins et al. C. A. 6th Cir. Certiorari denied. Reported below: 774 F. 2d 1162.

No. 85-6148. Granger *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 777 F. 2d 351.

No. 85-6157. Lawson *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 39.

No. 85-6161. Mosquera et al. *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 776 F. 2d 1071.

No. 85-6162. Castro *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 776 F. 2d 1118.

No. 85-6176. Gipson *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 85-6178. Randazzo *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 38.

No. 85-6179. SHACK *v.* SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND CORRECTIONAL DIAGNOSTIC AND CLASSIFICATION CENTER AT GRATERFORD. C. A. 3d Cir. Certiorari denied. Reported below: 776 F. 2d 1170.

No. 85-6180. SHARP *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 778 F. 2d 1182.

No. 85-6182. CRUZEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1084.

No. 85-6188. MURRAY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 780 F. 2d 1023.

No. 85-6189. GALVIN-MOREJON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 777 F. 2d 702.

No. 85-6190. NABORS *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 776 F. 2d 1064.

No. 85-6191. BRYANT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 770 F. 2d 1283.

No. 85-6195. ADU *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 2d 1511.

No. 85-6202. BEARD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 775 F. 2d 1577.

No. 85-6203. JOHNSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 774 F. 2d 1170.

No. 85-6205. DROEGE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 774 F. 2d 1178.

No. 85-6232. OLSEN *v.* DRUG ENFORCEMENT ADMINISTRATION. C. A. 11th Cir. Certiorari denied. Reported below: 776 F. 2d 267.

No. 85-6238. WARD *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 779 F. 2d 54.

No. 85-6241. CARTER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 776 F. 2d 1056.

No. 85–6243. JONES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 121.

No. 85–6245. PUGH *v.* UNITED STATES PAROLE COMMISSION. C. A. 3d Cir. Certiorari denied. Reported below: 782 F. 2d 1033.

No. 85–6251. ECHEVERRI-JARAMILLO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 777 F. 2d 933.

No. 85–6258. GIANGROSSO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 779 F. 2d 376.

No. 85–6261. SPECKIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 782 F. 2d 1044.

No. 85–6265. TAYLOR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 776 F. 2d 1055.

No. 84–6108. BUSH *v.* FLORIDA. Sup. Ct. Fla.;
No. 84–6971. STEVENS *v.* KEMP, WARDEN. Sup. Ct. Ga.;
No. 85–5702. BIRD *v.* TEXAS. Ct. Crim. App. Tex.;
No. 85–5741. SNOW *v.* NEVADA. Sup. Ct. Nev.;
No. 85–5784. FRANKLIN *v.* TEXAS. Ct. Crim. App. Tex.;
No. 85–5933. MIRANDA *v.* NEVADA. Sup. Ct. Nev.;
No. 85–5935. SMITH *v.* SOUTH CAROLINA. Sup. Ct. S. C.;
No. 85–5987. HORSLEY *v.* ALABAMA. Sup. Ct. Ala.;
No. 85–6009. BOGGS *v.* VIRGINIA. Sup. Ct. Va.;
No. 85–6072. GORE *v.* FLORIDA. Sup. Ct. Fla.;
No. 85–6089. PASTER *v.* TEXAS. Ct. Crim. App. Tex.;
No. 85–6098. DUNCAN *v.* TENNESSEE. Sup. Ct. Tenn.;
No. 85–6102. THOMAS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir.;
No. 85–6103. BIEGHLER *v.* INDIANA. Sup. Ct. Ind.;
No. 85–6123. MILLS *v.* FLORIDA. Sup. Ct. Fla.; and
No. 85–6146. FUNCHESS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: No. 84–6108, 461 So. 2d 936; No. 84–6971, 254 Ga. 228, 327 S. E. 2d 185; No. 85–5702, 692 S. W. 2d 65; No. 85–5741, 101 Nev. 439, 705 P. 2d 632; No. 85–5784, 693 S. W. 2d 420; No. 85–5933, 101 Nev. 562, 707 P. 2d 1121; No. 85–5935, 286 S. C. 406, 334 S. E. 2d 277; No. 85–5987,

476 So. 2d 626; No. 85–6009, 229 Va. 501, 331 S. E. 2d 407; No. 85–6072, 475 So. 2d 1205; No. 85–6089, 701 S. W. 2d 843; No. 85–6098, 698 S. W. 2d 63; No. 85–6102, 767 F. 2d 738; No. 85–6103, 481 N. E. 2d 78; No. 85–6123, 476 So. 2d 172; No. 85–6146, 772 F. 2d 683.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 85–400. FLORIDA *v.* ROMERO, AKA MASCARA. Dist. Ct. App. Fla., 3d Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 471 So. 2d 110.

No. 85–968. ARMONTROUT, WARDEN *v.* MOORE. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 766 F. 2d 1253.

No. 85–1005. DUCKWORTH, SUPERINTENDENT, INDIANA STATE PRISON *v.* WEBSTER. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 767 F. 2d 1206.

No. 85–459. MELLON BANK, N. A., ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 762 F. 2d 283.

JUSTICE O'CONNOR, with whom JUSTICE BLACKMUN and JUSTICE POWELL join, dissenting.

The Internal Revenue Code allows a deduction from the taxable estate of bequests "to or for the use of any corporation organized and operated exclusively for . . . charitable . . . purposes." 26 U. S. C. § 2055(a)(2). This petition presents the question whether a bequest to a nonprofit cemetery association qualifies for a deduction pursuant to this section.

A. Leon Davis died testate on December 6, 1976. His will provided that the residue of his estate was to be distributed to the Verona Cemetery in Oakmont, Pennsylvania. The cemetery was established by nearby residents in 1881 as a nonstock, nonprofit corporation for the purpose of providing burial space to any person regardless of religion or race. Davis' executors filed a federal estate tax return, paid the tax, and then submitted a claim asserting a charitable deduction of $370,901.74, the total amount distributed to the cemetery. The Internal Revenue Service disallowed the deduction and denied the accompanying claim for a refund. After exhausting administrative remedies, the executors instituted the present refund action in Federal District Court. Concluding that Verona Cemetery was a "corporation organized and operated exclusively for . . . charitable . . . purposes," 590 F. Supp. 160, 162, n. 1 (WD Pa. 1984), the District Court held that the bequest qualified for a deduction under § 2055(a)(2). In reaching that conclusion, the court observed that the cemetery was exempt from federal income taxes, that the bequest had already been held exempt from Pennsylvania's inheritance tax and, more generally, that bequests to public nonprofit cemetery associations traditionally had been considered charitable under the common law of trusts.

A divided panel of the Court of Appeals for the Third Circuit reversed. 762 F. 2d 283 (1985). It acknowledged the "anomaly" of treating nonprofit cemetery associations differently for federal estate and income tax purposes. It believed, however, that this asymmetry was compelled by the language and history of the relevant provisions of the Code. Employing language that closely parallels § 2055(a)(2), § 501(c)(3) exempts from federal income taxes "[c]orporations . . . organized and operated exclusively for . . . charitable . . . purposes." Since 1913, the Code has included a separate exemption for "[c]emetery companies owned and operated exclusively for the benefit of their members or which are not operated for profit." 26 U. S. C. § 501(c)(13). In 1954, as part of the general revision of the Code, Congress enacted § 170(c)(5), which permits deductions of contributions to any cemetery company that meets a standard virtually identical to that set out in § 501(c)(13). After examining this history, the Court of Appeals concluded that nonprofit cemetery companies did not qualify as a "charitable" corporation under § 2055(a)(2). Because Congress had thought it necessary to enact a special provision for cemeteries on the income tax side, the court reasoned, it must have believed that such entities were not within the general deduction for "charitable" contributions. 26 U. S. C. § 170 (c)(2)(B). Thus, the court concluded, the failure to adopt a parallel provision on the estate tax side foreclosed petitioners' contention that cemetery associations qualified as "charitable" within the meaning of § 2055(a)(2).

This reasoning is far from inevitable. That Congress explicitly provided for nonprofit cemetery associations in § 501(c)(13) and § 170(c)(5) does not lead inescapably to the conclusion that many such associations are not within the more general exemption for "charitable" corporations. Some family cemetery corporations, for example, are covered by § 501(c)(13) but almost certainly would not qualify as "charitable" within the more general language of § 501(c)(3). See *John D. Rockefeller Family Cemetery Corp.* v. *Commissioner*, 63 T. C. 355 (1974). Congress clearly intended to confer on these private cemetery associations an exemption from federal income taxation. *Ibid.* The nearly identical language of § 170(c)(5) suggests that Congress also intended that contributions to such associations be tax deductible. But it does not inevitably follow that public organizations that already qualified as "charitable" suddenly ceased to be so by virtue of a decision to afford a tax benefit to some organizations that could not meet this more restrictive requirement. This construction is especially unlikely in light of the virtually uniform consensus under state common and statutory law that nonprofit, public cemetery associations are "charitable" and that bequests to such organizations are therefore exempt from inheritance taxes. See, *e. g., In re Estate of Edwards*, 88 Cal. App. 3d 383, 151 Cal. Rptr. 770 (1979). See also Restatement (Second) of Trusts § 374, Comment *h* (1959).

I recognize that the Court of Appeals' analysis conforms with that of other federal courts that have considered the issue. See, *e. g., Child* v. *United States*, 540 F. 2d 579, 584 (CA2 1976). I recognize also, in the words of the dissenting judge below, that "[t]he Republic will stand" regardless of how this issue is resolved. 762 F. 2d, at 287. Nonetheless, because the Court of Appeals' construction of the Code will have a significant impact on the financial vitality of these organizations and because I am unconvinced that this anomalous construction is justified by the language and history of the relevant provisions of the Code, I would grant the petition for certiorari.

No. 85-633. AMREP CORP. *v.* FEDERAL TRADE COMMISSION. C. A. 10th Cir. Certiorari denied. Reported below: 768 F. 2d 1171.

JUSTICE WHITE, dissenting.

The Federal Trade Commission ordered petitioner to cease various unfair trade practices in selling land, and required, among other things, that petitioner send all customers still under land sale contracts with it a letter disclosing that the Commission had brought an action against petitioner and explaining possible courses of action the customers might take. The United States Court of Appeals for the Tenth Circuit affirmed the Commission's order over petitioner's objection that the notification order was not within the Commission's remedial authority under § 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. § 45. 768 F. 2d 1171 (1985). The Tenth Circuit's decision is at odds with decisions of the Fourth and Ninth Circuits holding that § 5 authorizes only cease-and-desist orders, and not notification orders. See *Barrett Carpet Mills, Inc.* v. *Consumer Product Safety Comm'n*, 635 F. 2d 299 (CA4 1980); *Congoleum Industries, Inc.* v. *Consumer Product Safety Comm'n*, 602 F. 2d 220 (CA9 1979).* I would grant certiorari to resolve this apparent conflict.

No. 85–769. ORUM *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied. JUSTICE BRENNAN and JUSTICE POWELL would grant certiorari.

No. 85–786. BELLISSIMO *v.* WESTINGHOUSE ELECTRIC CORP. ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE O'CONNOR would grant certiorari. Reported below: 764 F. 2d 175.

No. 85–849. PRESIDIO VALLEY FARMERS ASSN. ET AL. *v.* CALDERON ET AL. C. A. 5th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 765 F. 2d 1334.

No. 85–926. CHRISTIAN BROADCASTING NETWORK, INC. *v.* COPYRIGHT ROYALTY TRIBUNAL. C. A. D. C. Cir. Motion of Old-Time Gospel Hour et al. for leave to file out-of-time brief in support of petition denied. Certiorari denied. Reported below: 249 U. S. App. D. C. 4, 772 F. 2d 922.

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*The decisions in *Barrett* and *Congoleum* are interpretations of the powers of the Consumer Product Safety Commission under the Flammable Fabrics Act, 15 U. S. C. § 1191 *et seq.* Since 15 U. S. C. § 1194 incorporates § 5 of the Federal Trade Commission Act by reference, *Barrett* and *Congoleum* are effectively interpretations of the scope of § 5.

No. 85-960. COLSON *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 498 A. 2d 585.

No. 85-974. HESS *v.* TREECE. Sup. Ct. Ark. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 286 Ark. 434, 693 S. W. 2d 792.

No. 85-961. HOLDING *v.* SOVRAN BANK ET AL. Sup. Ct. Va. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 85-1020. GELLERT *v.* EASTERN AIR LINES, INC. Sup. Ct. Fla. Certiorari denied. JUSTICE BRENNAN took no part in the consideration or decision of this petition. Reported below: 475 So. 2d 694.

No. 85-1098. VEVODA ET AL. *v.* MILK DRIVERS & DAIRY EMPLOYEES UNION, TEAMSTERS LOCAL 302. C. A. 9th Cir. Motion of National Right to Work Legal Defense Foundation for leave to file a brief as *amicus curiae* granted. Certiorari denied. JUSTICE O'CONNOR would grant certiorari. Reported below: 772 F. 2d 530.

No. 85-1173. SPANG & CO. *v.* GRECCO. C. A. 3d Cir. Certiorari denied. JUSTICE WHITE and JUSTICE O'CONNOR would grant certiorari. Reported below: 779 F. 2d 44.

No. 85-5928. LEON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 775 F. 2d 302.

No. 85-5972. SCHIRO *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 479 N. E. 2d 556.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

The trial judge in this case rejected a unanimous jury decision that petitioner's life should be spared, and sentenced him to die. Petitioner's allegations, which call into question the reliability of the judge's sentencing determination, further illustrate why a judge should not have the awesome power to reject a jury recommendation of life. Moreover, a serious inadequacy in the Indiana capital sentencing procedure dramatically distinguishes it from the jury-override procedure that this Court upheld in *Spaziano* v.

Florida, 468 U. S. 447 (1984). I must dissent from the Court's decision not to consider petitioner's substantial claims.

I

Thomas N. Schiro was convicted of murder in the course of a rape and, following a hearing on the appropriateness of sentencing him to die, the jury recommended a life sentence. The trial judge, however, rejected the jury's decision and imposed a sentence of death. Upon direct appeal, the Supreme Court of Indiana found that the trial court's findings pertaining to the sentencing did not set out clearly and properly the court's reasons for imposing the death penalty. *Schiro* v. *State*, 451 N. E. 2d 1047, 1056 *(Schiro I)*, cert. denied, 464 U. S. 1003 (1983). That court ordered that the trial court make written findings setting out the aggravating circumstance proved beyond a reasonable doubt and the mitigating circumstances, if any, as listed in the state statute. 451 N. E. 2d, at 1056.

In response, the trial court specified one aggravating circumstance, that the jury had convicted petitioner of murder in the course of a rape; it then stated that it found no mitigating circumstances, listing and rejecting each of the statutory mitigating circumstances, even though several were suggested by the evidence. With regard to the mitigating factor concerning a defendant's mental or emotional condition and the impairment of his capacity to appreciate the criminality of his acts, the court found as follows:

> "This Court personally observed the Defendant, while the jury was present, making continual rocking motions, which did not stop throughout the trial except when the jury left the Courtroom. In the Court's outer chambers, out of the presence of the jury, in the eight days of trial, the Court frequently observed the Defendant sitting calmly and not rocking. It is apparent to the Court that this may well have influenced and misled the jury in its recommendation."

On the basis of his own suspicions, not subject to evidentiary requirements or tested by cross-examination, the judge decided that a unanimous jury was wrong and that petitioner should die. The Indiana Supreme Court upheld the sentence of death. 479 N. E. 2d 556 (1985).

II

In *Spaziano* v. *Florida*, *supra*, this Court sustained a scheme that gave the judge the power to override the jury's decision to impose a life sentence, provided that the judge could make certain specified findings. The Court relied, in part, on the Florida Supreme Court's anticipated adherence to the so-called "*Tedder* standard." Under *Tedder* v. *State*, 322 So. 2d 908, 910 (Fla. 1975), a Florida trial judge may not reject a jury decision of life imprisonment unless the evidence favoring death is "so clear and convincing that virtually no reasonable person could differ." *Ibid.* This Court believed *Tedder* to be a "significant safeguard," *Spaziano*, 468 U. S., at 465, and was satisfied that "the Florida Supreme Court takes that standard seriously." *Ibid.*

In contrast, the State of Indiana has not committed itself to any comparable safeguard to protect against the arbitrary rejection of a life sentence. On the contrary, the rules governing the scope of appellate review of sentences provide that the appellate court "will not revise a sentence authorized by statute except where such sentence is *manifestly unreasonable*," and a "sentence is not manifestly unreasonable unless no reasonable person could find such sentence appropriate . . . ." Indiana Rules Appellate Review of Sentences 1, 2 (emphasis added). Applying these rules to death sentences, the Supreme Court of Indiana specifically declared that it "will not engage in a different standard of review where jury and trial court disagree" concerning the appropriateness of the death sentence. *Schiro I*, *supra*, at 1058. Thus, while the *Tedder* standard accords the jury's recommendation a presumption of correctness by requiring "clear and convincing" evidence to justify overriding it, the Indiana Supreme Court accords a similar presumption to the judge's sentence, whether it was imposed pursuant to the recommendation of the jury or against it.

This Court has emphasized that a sentence of death must reflect an ethical judgment about the "moral guilt" of the defendant. See *Enmund* v. *Florida*, 458 U. S. 782, 800–801 (1982). "Moral guilt" is a determination that a jury, as representative of the community, is peculiarly well suited to render. But if a prosecutor, even with the substantial tools available to him, see, *e. g.*, *Wainwright* v. *Witt*, 469 U. S. 412 (1985); *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), is unable to persuade the conscience of the community that death is the appropriate punishment for a particular offense, then that expression on the question of "moral guilt" is entitled to at least some weight. By according no significance at all to the jury's assessment of the crime and the defendant, either at the sentencing itself or on appeal, Indiana's procedure derogates the historic role of the jury. "*Furman* [v. *Georgia*, 408 U. S. 238 (1972),] and its progeny provide no warrant for—indeed do not tolerate—the exclusion from the capital sentencing process of the jury and the critical contribution only it can make toward linking the administration of capital punishment to community values." *Spaziano*, *supra*, at 489–490 (STEVENS, J., joined by BRENNAN and MARSHALL, JJ., dissenting in part).

Moreover, the disregard of jury determinations injects a "level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." *Beck* v. *Alabama*, 447 U. S. 625, 643 (1980). In this case, for example, the judge speculated that the jury's recommendation of life "may well have" resulted from petitioner's propensity to rock back and forth in the presence of the jury. Indiana law does not require the jury to set forth its reasons for recommending a life sentence, so the court could not have known whether the rocking motion had anything to do with the jury's verdict; the court's decision was necessarily speculative. The reliability that this Court has demanded from capital sentencing decisions is totally lacking here, and the "manifestly unreasonable" standard adopted by the Supreme Court of Indiana effectively insulates the sentence from meaningful review.

Because I understand the Eighth Amendment to require, at the very least, that a jury's considered recommendation of a life sentence rather than death not be ignored without some showing that it was unreasonable, I would grant the petition to review Indiana's method of bringing to execution those whose juries believed that they should live.

No. 85–6010. WATERS *v.* KEMP, WARDEN. Sup. Ct. Ga. Certiorari denied. JUSTICE MARSHALL and JUSTICE BLACKMUN would grant the petition for writ of certiorari, vacate the judgment, and remand the case for further consideration in light of *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985).

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

Rehearing Denied

No. 84–1855. STEINES *v.* ROCK ISLAND ARSENAL DEPARTMENT OF ARMY ET AL., 474 U. S. 822;

No. 84–6051. ALLEN *v.* GEORGIA, 470 U. S. 1059;

No. 85–654. HURVITZ *v.* DIVISION OF MEDICAL QUALITY, BOARD OF MEDICAL QUALITY ASSURANCE, DEPARTMENT OF CONSUMER AFFAIRS OF CALIFORNIA, 474 U. S. 1081;

No. 85–753. PENNINGTON, ADMINISTRATOR FOR THE ESTATE OF TORRES *v.* FLOTA MERCANTE GRANCOLOMBIANA, S.A., ET AL., 474 U. S. 1057;

No. 85–5155. MCKINNEY *v.* ELLIS ET AL., 474 U. S. 1022;

No. 85–5337. SCHEPPF *v.* KING, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS, ET AL., 474 U. S. 1035;

No. 85–5525. VEALE ET AL. *v.* VEALE ET AL., 474 U. S. 1010;

No. 85–5633. CALPIN *v.* UNITED STATES, 474 U. S. 1084;

No. 85–5642. HANCE *v.* GEORGIA, 474 U. S. 1038;

No. 85–5663. CONKLIN *v.* GEORGIA, 474 U. S. 1038;

No. 85–5695. FRAZIER *v.* PLACER SAVINGS & LOAN ASSN. ET AL., 474 U. S. 1035;

No. 85–5725. GENTSCH *v.* ROBERSON ET AL., 474 U. S. 1065;

No. 85–5777. PARKER *v.* FAIRMAN, WARDEN, ET AL., 474 U. S. 1066;

No. 85–5810. HOOKS *v.* PHELPS, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS, 474 U. S. 1068; and

No. 85–5867. MARTIN *v.* OHIO, 474 U. S. 1073. Petitions for rehearing denied.

No. 85–5165. BROWN *v.* WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY ET AL., 474 U. S. 858;

No. 85–5405. AMES *v.* ALASKA ET AL., 474 U. S. 951; and

No. 85–5433. SANCHEZ *v.* ROTH ET AL., 474 U. S. 982. Motions for leave to file petitions for rehearing denied.

FEBRUARY 25, 1986

Certiorari Granted. (See No. 84–1360, *ante*, at 43–44, n. 1.)

FEBRUARY 26, 1986

Dismissal Under Rule 53

No. 85–1003. PEREIRA *v.* UTAH TRANSPORT, INC., ET AL. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 764 F. 2d 686.

Miscellaneous Order

No. A–651 (85–6276). BUNDY *v.* FLORIDA. Sup. Ct. Fla. Application for stay of execution of sentence of death, scheduled for Tuesday, March 4, 1986, presented to JUSTICE POWELL, and by him referred to the Court, is granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the issuance of the mandate of this Court. Motion for leave to supplement the petition for writ of certiorari is granted. Supplement is to be filed on or before March 28, 1986. Response to the supplement shall be filed on or before April 11, 1986. Motion to defer consideration of the petition for writ of certiorari is granted pending receipt of the supplement to the petition and the response thereto.

FEBRUARY 28, 1986

Miscellaneous Order

No. A–653. ADAMS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application for stay.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay in order to give the applicant time to file a petition for writ of certiorari, and would grant the petition and vacate the death sentence in this case.

MARCH 1, 1986

Rehearing Denied

No. A–653. ADAMS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., *ante* this page. Petition for rehearing denied.

MARCH 3, 1986

Dismissal Under Rule 53

No. 85–1213. PACKAGING SERVICE CORPORATION OF KENTUCKY ET AL. *v.* GAYNER. Appeal from Ct. App. Ky. dismissed under this Court's Rule 53.

Appeals Dismissed

No. 85–987. Metropolitan Atlanta Rapid Transit Authority *v.* Amalgamated Transit Union International, AFL–CIO, et al. Appeal from C. A. D. C. Cir. dismissed for want of jurisdiction. Reported below: 248 U. S. App. D. C. 411, 771 F. 2d 1551.

No. 85–6026. Names *v.* California. Appeal from Ct. App. Cal., 6th App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85–6144. Acuff *v.* Henry et al. Appeal from Sup. Ct. Tex. dismissed for want of substantial federal question.

Vacated and Remanded on Appeal

No. 85–1116. City of Whittier et al. *v.* Walnut Properties, Inc., et al. Appeal from C. A. 9th Cir. Judgment vacated and case remanded for further consideration in light of *Renton* v. *Playtime Theatres, Inc.*, *ante*, p. 41. Reported below: 774 F. 2d 1176.

Miscellaneous Orders

No. — ——. Grace *v.* Heartland Transportation Inc. Motion of petitioner seeking leave to proceed as a seaman and to be relieved from printing the petition for writ of certiorari and the petition for writ of mandamus in compliance with Rule 33 denied. Justice Stevens would grant the motion.

No. A–625 (85–1429). American General Life & Accident Insurance Co. *v.* Miller et al. Sup. Ct. Miss. Application for stay pending appeal, addressed to Justice Powell and referred to the Court, denied. Justice Blackmun dissents.

No. D–512. In re Disbarment of Meisner. Disbarment entered. [For earlier order herein, see 473 U. S. 930.]

No. D–529. In re Disbarment of Mendell. Disbarment entered. [For earlier order herein, see 474 U. S. 941.]

No. D–534. In re Disbarment of Pesner. Disbarment entered. [For earlier order herein, see 474 U. S. 1016.]

No. D–537. In re Disbarment of Kidwell. Disbarment entered. [For earlier order herein, see 474 U. S. 1030.]

No. 84–1979. MERITOR SAVINGS BANK, FSB *v.* VINSON ET AL. C. A. D. C. Cir. [Certiorari granted *sub nom. PSFS Savings Bank* v. *Vinson*, 474 U. S. 815.] Motion of Women's Legal Defense Fund et al. for leave to participate in oral argument as *amici curiae* and for divided argument denied.

No. 85–227. SMALIS ET AL. *v.* PENNSYLVANIA. Sup. Ct. Pa. [Certiorari granted, 474 U. S. 944.] Motion of National District Attorneys Association et al. for leave to file a brief as *amici curiae* granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 85–766. TASHJIAN, SECRETARY OF STATE OF CONNECTICUT *v.* REPUBLICAN PARTY OF CONNECTICUT ET AL. C. A. 2d Cir. [Probable jurisdiction noted, 474 U. S. 1049.] Motion of appellant to schedule oral argument during April Session denied. JUSTICE REHNQUIST, JUSTICE STEVENS, and JUSTICE O'CONNOR would grant this motion.

No. 85–905. SALISBURY *v.* JAMES RIVER CORP. ET AL., 474 U. S. 1061. Motion of respondent James River Corp. for damages and fees denied.

No. 85–998. UNITED STATES *v.* DUNN. C. A. 5th Cir. Motion of the Solicitor General to defer consideration of the petition for writ of certiorari granted.

No. 85–1258. BROWN ET AL. *v.* KERR-MCGEE CHEMICAL CORP. C. A. 7th Cir. Motion of respondent to expedite consideration of the petition for certiorari denied.

No. 85–6033. SHAH *v.* KERN COUNTY, CALIFORNIA, ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until March 24, 1986, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 85-6150. IN RE NELSON. Petition for writ of mandamus denied.

No. 85-6126. IN RE LARTEY; and

No. 85-6183. IN RE MAY. Petitions for writs of mandamus and/or prohibition denied.

Certiorari Granted

No. 85-693. ASAHI METAL INDUSTRY CO., LTD. *v.* SUPERIOR COURT OF CALIFORNIA, SOLANO COUNTY (CHENG SHIN RUBBER INDUSTRIAL CO., LTD., REAL PARTY IN INTEREST). Sup. Ct. Cal. Certiorari granted. Reported below: 39 Cal. 3d 35, 702 P. 2d 543.

No. 85-781. BURKE, ACTING ARCHIVIST OF THE UNITED STATES, ET AL. *v.* BARNES ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 245 U. S. App. D. C. 1, 759 F. 2d 21.

No. 85-920. ALASKA AIRLINES, INC., ET AL. *v.* BROCK, SECRETARY OF LABOR, ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 247 U. S. App. D. C. 132, 766 F. 2d 1550.

No. 85-971. CLARKE, COMPTROLLER OF THE CURRENCY *v.* SECURITIES INDUSTRY ASSN.; and

No. 85-972. SECURITY PACIFIC NATIONAL BANK *v.* SECURITIES INDUSTRY ASSN. C. A. D. C. Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 244 U. S. App. D. C. 419, 758 F. 2d 739, and 247 U. S. App. D. C. 42, 765 F. 2d 1196.

Certiorari Denied. (See also No. 85-6026, *supra.*)

No. 84-1747. SHOULTZ *v.* MONFORT OF COLORADO, INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 754 F. 2d 318.

No. 85-489. JACQUES *v.* ALDRICH, UNITED STATES DISTRICT COURT JUDGE FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 761 F. 2d 302.

No. 85-569. DRAVO BASIC MATERIALS CO. ET AL. *v.* LOUISIANA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 758 F. 2d 1081.

No. 85–615. California Department of Transportation *v.* Naegele Outdoor Advertising Company of California, Inc., et al.; and

No. 85–639. Desert Outdoor Advertising, Inc. *v.* Naegele Outdoor Advertising Company of California, Inc. Sup. Ct. Cal. Certiorari denied. Reported below: 38 Cal. 3d 509, 698 P. 2d 150.

No. 85–645. Law & Technology Press *v.* Ladd, Register of Copyrights. C. A. 9th Cir. Certiorari denied. Reported below: 762 F. 2d 809.

No. 85–750. Rose, Individually and as Superintendent of the Calloway County Schools, et al. *v.* Littlejohn. C. A. 6th Cir. Certiorari denied. Reported below: 768 F. 2d 765.

No. 85–799. Monroe *v.* United States Department of the Treasury. C. A. Fed. Cir. Certiorari denied. Reported below: 770 F. 2d 1044.

No. 85–879. Thomas International Ltd. *v.* United States. C. A. Fed. Cir. Certiorari denied. Reported below: 773 F. 2d 300.

No. 85–900. Illinois *v.* Crilly, Judge, Circuit Court of Cook County, Illinois, et al. Sup. Ct. Ill. Certiorari denied. Reported below: 108 Ill. 2d 301, 483 N. E. 2d 1236.

No. 85–914. Jureczki *v.* City of Seabrook, Texas, et al. C. A. 5th Cir. Certiorari denied. Reported below: 765 F. 2d 1120.

No. 85–922. Inexco Oil Co. *v.* United States Department of Energy et al. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 776 F. 2d 1554.

No. 85–965. Loomis *v.* United States; and

No. 85–966. Vermouth *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 915.

No. 85–973. Hansen *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 249 U. S. App. D. C. 22, 772 F. 2d 940.

No. 85–977. COPELAND *v.* RODRIGUEZ ET AL. Sup. Ct. La. Certiorari denied. Reported below: 475 So. 2d 1071.

No. 85–988. METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY *v.* AMALGAMATED TRANSIT UNION INTERNATIONAL, AFL–CIO, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 247 U. S. App. D. C. 149, 767 F. 2d 939.

No. 85–990. AMERICAN POSTAL WORKERS UNION, AFL–CIO, ET AL. *v.* UNITED STATES POSTAL SERVICE. C. A. 2d Cir. Certiorari denied. Reported below: 766 F. 2d 715.

No. 85–994. PFLAUMER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 774 F. 2d 1224.

No. 85–1012. PEAT, MARWICK, MITCHELL & CO. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 8th Cir. Certiorari denied. Reported below: 775 F. 2d 928.

No. 85–1045. SPRYNCZYNATYK ET AL. *v.* GENERAL MOTORS CORP. C. A. 8th Cir. Certiorari denied. Reported below: 771 F. 2d 1112.

No. 85–1064. FAITH CENTER, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION. C. A. D. C. Cir. Certiorari denied.

No. 85–1077. EMPLOYERS INSURANCE OF WAUSAU *v.* INGERSOLL-RAND FINANCIAL CORP. C. A. 5th Cir. Certiorari denied. Reported below: 771 F. 2d 910.

No. 85–1081. BOURKE *v.* EAST BAY REGIONAL PARK DISTRICT ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 85–1121. RICHARD A. PLEHN, INC., ET AL. *v.* IMPERIAL BANCORP ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 760 F. 2d 276.

No. 85–1126. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 2d 810.

No. 85–1131. WHITTAKER CORP. *v.* WILDER. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 169 Cal. App. 3d 969, 215 Cal. Rptr. 536.

No. 85–1133. ABBOT ET AL. *v.* HAGNER MANAGEMENT CORP. Ct. App. D. C. Certiorari denied.

No. 85–1138. KENT *v.* SANBORN COOPERATIVE GRAIN CO. C. A. 7th Cir. Certiorari denied. Reported below: 772 F. 2d 299.

No. 85–1148. MORRIS *v.* BOARD OF PROFESSIONAL RESPONSIBILITY FOR THE DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied. Reported below: 495 A. 2d 1162.

No. 85–1151. LAROUCHE ET AL. *v.* CROWELL, SECRETARY OF STATE OF TENNESSEE. Ct. App. Tenn. Certiorari denied. Reported below: 709 S. W. 2d 585.

No. 85–1152. BANDAI AMERICA INC. ET AL. *v.* BALLY MIDWAY MFG. CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 775 F. 2d 70.

No. 85–1153. KEARNEY & TRECKER CORP. *v.* PHUC HUU NGUYEN ET UX. Ct. App. Wis. Certiorari denied. Reported below: 126 Wis. 2d 509, 375 N. W. 2d 219.

No. 85–1154. ELLSWORTH ET AL. *v.* CITY OF RACINE, WISCONSIN. C. A. 7th Cir. Certiorari denied. Reported below: 774 F. 2d 182.

No. 85–1159. EXXON SHIPPING CO. *v.* COOK, PERSONAL REPRESENTATIVE OF THE ESTATE OF COOK. C. A. 9th Cir. Certiorari denied. Reported below: 762 F. 2d 750 and 773 F. 2d 1001.

No. 85–1164. TEXAS ENERGY INVESTMENT CORP. ET AL. *v.* NIMROD MARKETING (OVERSEAS) LTD. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 769 F. 2d 1076.

No. 85–1168. CITY OF CLEVELAND ET AL. *v.* HAWLEY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 773 F. 2d 736.

No. 85–1172. MITCHELL *v.* PEPSI-COLA BOTTLERS, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 772 F. 2d 342.

No. 85–1174. WYATT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 762 F. 2d 908.

No. 85–1179. SONDEREGGER *v.* E. F. HUTTON & CO., INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 2d 171.

No. 85–1205. ROSENTHAL ET AL. *v.* DAY ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 170 Cal. App. 3d 1125, 217 Cal. Rptr. 89.

No. 85–1221. FOSTER *v.* ARCATA ASSOCIATES, INC. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 1453.

No. 85–1269. HOWARD ET AL. *v.* DEERBROOK STATE BANK. C. A. 7th Cir. Certiorari denied. Reported below: 776 F. 2d 1051.

No. 85–1284. MONTEMAYOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 776 F. 2d 1046.

No. 85–1328. BONOMO ET AL. *v.* HARTFORD ACCIDENT & INDEMNITY CO. Ct. App. Ind. Certiorari denied. Reported below: 474 N. E. 2d 152.

No. 85–5680. CAMPBELL *v.* MORRIS, SUPERINTENDENT, SOUTHEASTERN OHIO TRAINING CENTER, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 769 F. 2d 314.

No. 85–5742. REED *v.* LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 759 F. 2d 618.

No. 85–5771. BOWLDING *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 767 F. 2d 913.

No. 85–5812. VIA *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 146 Ariz. 108, 704 P. 2d 238.

No. 85–5824. MILLER *v.* STAGNER, SUPERINTENDENT, CORRECTIONAL TRAINING FACILITY. C. A. 9th Cir. Certiorari denied. Reported below: 757 F. 2d 988 and 768 F. 2d 1090.

No. 85–5872. WOODLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 774 F. 2d 1175.

No. 85–5908. CRUMP *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 772 F. 2d 719.

No. 85–5923. HELLWARTH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 774 F. 2d 1178.

No. 85–5967. DRYDEN *v.* SAFECO INSURANCE COMPANY OF AMERICA. C. A. 10th Cir. Certiorari denied.

No. 85–5988. BLOCKER *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 422 Mich. 971.

No. 85–5991. MUNOZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 85–6000. DEANES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 779 F. 2d 44.

No. 85–6024. WILLIAMS *v.* REES, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 774 F. 2d 1164.

No. 85–6034. BELASCO *v.* MORRIS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 776 F. 2d 1052.

No. 85–6039. TRIPATI *v.* BRIMMER, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING, ET AL. C. A. 10th Cir. Certiorari denied.

No. 85–6044. BOYD *v.* CUPP, SUPERINTENDENT, OREGON STATE PENITENTIARY. Ct. App. Ore. Certiorari denied.

No. 85–6050. GONZALEZ *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 11th Cir. Certiorari denied. Reported below: 768 F. 2d 1351.

No. 85–6055. LAMA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 39.

No. 85–6057. FREEMAN *v.* STAGNER, SUPERINTENDENT, CORRECTIONAL TRAINING FACILITY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 757 F. 2d 988 and 768 F. 2d 1090.

No. 85–6058. LACKHOUSE *v.* MERIT SYSTEMS PROTECTION BOARD ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 773 F. 2d 313.

No. 85–6060. BROWN *v.* BRYANT ET AL. C. A. 11th Cir. Certiorari denied.

No. 85–6065. ARIZA-FUENTAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 773 F. 2d 1541.

No. 85–6069. COPLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 774 F. 2d 728.

No. 85-6077. TILLIS *v.* DAVIS, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 85-6084. MUNGUIA ET AL. *v.* CHEVRON CO., U. S. A., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 768 F. 2d 649.

No. 85-6085. BARBER *v.* PONTE, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 772 F. 2d 982.

No. 85-6086. GARRIS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 64 Md. App. 721.

No. 85-6096. JEFFRIES *v.* CHICAGO TRANSIT AUTHORITY. C. A. 7th Cir. Certiorari denied. Reported below: 770 F. 2d 676.

No. 85-6101. WILLIS *v.* NEWSOME, SUPERINTENDENT, GEORGIA STATE PRISON. C. A. 11th Cir. Certiorari denied. Reported below: 771 F. 2d 1445.

No. 85-6111. WEBSTER *v.* BOARD OF TRUSTEES OF SCHOOL DISTRICT NO. 25, BANNOCK COUNTY, POCATELLO, IDAHO. C. A. 9th Cir. Certiorari denied. Reported below: 774 F. 2d 1176.

No. 85-6114. SMITH *v.* MONSANTO CHEMICAL CO. C. A. 8th Cir. Certiorari denied. Reported below: 770 F. 2d 719.

No. 85-6117. SEEVERS *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 785 F. 2d 325.

No. 85-6118. MARTIN *v.* LITTLE, BROWN & CO. C. A. 3d Cir. Certiorari denied.

No. 85-6125. BROWN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 131 Ill. App. 3d 1160, 493 N. E. 2d 1220.

No. 85-6130. PRESGRAVES *v.* HEDRICK, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 85-6134. ROBINSON *v.* COWLEY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 85-6135. PERKINS *v.* ALESI ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 782 F. 2d 1045.

No. 85-6136. SPARKS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 779 F. 2d 47.

No. 85-6137. RIVERA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 775 F. 2d 1559.

No. 85-6139. REEDER *v.* MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 774 F. 2d 1163.

No. 85-6140. BORRMAN *v.* MAGGIO, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 777 F. 2d 699.

No. 85-6149. OKOT *v.* HAMMERSLEY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 912.

No. 85-6152. BURGESS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 774 F. 2d 1177.

No. 85-6153. CICALA *v.* BUTTERCREEK INVESTMENT CORP. Sup. Ct. Pa. Certiorari denied.

No. 85-6154. KELLY *v.* CITY OF WAUTOMA, WISCONSIN. Ct. App. Wis. Certiorari denied.

No. 85-6156. DABON *v.* BLACKBURN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 85-6159. RASKE *v.* FALLON ET AL. C. A. 11th Cir. Certiorari denied.

No. 85-6160. SMOTHERMON *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 85-6163. HAASE *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 125 Wis. 2d 578, 373 N. W. 2d 89.

No. 85-6165. GRAF *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 125 Wis. 2d 574, 373 N. W. 2d 86.

No. 85-6169. LLOYD *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied. Reported below: 776 F. 2d 1053.

No. 85-6172. MESHULAM *v.* MESHULAM ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 774 F. 2d 1149.

No. 85-6173. TOMPKINS *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 705 P. 2d 836.

No. 85-6174. PALOW *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 777 F. 2d 52.

No. 85-6175. FLOYD *v.* GENERAL MOTORS CORP. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 761 F. 2d 696.

No. 85-6177. KIRKSEY-BEY *v.* YOUNG ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 782 F. 2d 1048.

No. 85-6181. VILLANUEVA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 780 F. 2d 1029.

No. 85-6184. MITCHELL *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 62 Md. App. 733.

No. 85-6185. GALLOWAY *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 238 Kan. 100, 708 P. 2d 508.

No. 85-6193. COLATRIANO *v.* CAVE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1068.

No. 85-6199. GARRETT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 780 F. 2d 1021.

No. 85-6204. KIDD *v.* UNITED VIRGINIA BANK OF LYNCHBURG, VIRGINIA, N. A., ET AL. C. A. 4th Cir. Certiorari denied.

No. 85-6210. FAIRFAX *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 85-6216. PETERSON *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied. Reported below: 103 N. M. 638, 711 P. 2d 915.

No. 85-6220. GADDIS *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 785 F. 2d 325.

No. 85-6225. DELORIA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 85–6226. GOLDSTON *v.* ARIZONA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 780 F. 2d 1026.

No. 85–6235. WARDY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 777 F. 2d 101.

No. 85–6244. JONES *v.* DEROBERTIS, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 766 F. 2d 270.

No. 85–6248. STEPHENS *v.* MONTANA. C. A. 9th Cir. Certiorari denied. Reported below: 780 F. 2d 1028.

No. 85–6262. D'ARCO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 85–6295. WARD *v.* BLEVINS, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 85–6300. AROCENA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 778 F. 2d 943.

No. 85–6309. HUBBLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 772 F. 2d 909.

No. 85–539. LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. *v.* ENOCH ET AL. C. A. 7th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 768 F. 2d 161.

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, dissenting.

For the reasons I have twice before stated, *Smith* v. *Jago*, 470 U. S. 1060 (1985) (dissenting), *Taliaferro* v. *Maryland*, 461 U. S. 948 (1983) (dissenting), I dissent from the Court's refusal to resolve the important question, which has divided the lower courts, of when, if ever, a State may exclude a defense witness on account of a criminal defendant's failure to comply with a discovery rule.

No. 85–727. MISSOURI FARMERS ASSN., INC. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 764 F. 2d 488.

JUSTICE WHITE, dissenting.

In this case the United States Court of Appeals for the Eighth Circuit held that a federal regulation provides the appropriate rule for deciding whether the Farmers Home Administration (FmHA) retains a continuing security interest in collateral to whose sale the FmHA allegedly consented.* 764 F. 2d 488 (1985). The question presented is whether, under *United States* v. *Kimbell Foods, Inc.*, 440 U. S. 715 (1979), the Eighth Circuit erred in looking to federal regulations rather than state law for the rule of decision.

In *Kimbell Foods* this Court determined that although federal law should determine the priority of liens stemming from federal lending programs, a national rule is not necessary to protect the federal interests underlying the loan programs of the Small Business Administration and FmHA. Thus, we held that "absent a *congressional* directive, the relative priority of private liens and consensual liens arising from these Government lending programs is to be determined under nondiscriminatory state laws." *Id.*, at 740 (emphasis added).

I find it difficult to reconcile the Court of Appeals' decision with *Kimbell Foods*. A federal regulation is not a congressional directive, and although *Kimbell Foods* involves a question of lien priority while the present case concerns the extinguishment of a federal lien, that distinction is tenuous at best.

Besides being in obvious tension with *Kimbell Foods*, the Court of Appeals' decision conflicts with the decision in *United States* v. *Tugwell*, 779 F. 2d 5 (CA4 1985), which holds that under *Kimbell Foods* the question whether a FmHA lien is extinguished upon sale of the collateral must be resolved by looking to state law. I would grant certiorari to resolve this conflict among the Courts of Appeals.

No. 85–757. LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. *v.* REED. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 759 F. 2d 618.

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*The regulation on which the Eighth Circuit relied is 7 CFR § 1962.18(b) (1985), which at the time the case was decided provided in relevant part:

"When borrowers [from the FmHA] sell security, the sale will be made subject to the FmHA lien. The property and proceeds will remain subject to the lien until the lien is released or the sale is approved by the County Supervisor and the proceeds are used for one or more of the purposes stated in § 1962.17."

This regulation has since been rewritten: 50 Fed. Reg. 45787 (1985) (proposed 7 CFR § 1962.17(a)), which provides that "[w]hen the borrower sells security, the property and proceeds remain subject to the lien until the lien is released by the County Supervisor." This change in wording is immaterial to the issues presented in this case.

No. 85–1061. OWENS, SUPERINTENDENT, INDIANA STATE REFORMATORY *v.* RINER. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 764 F. 2d 1253.

No. 85–785. RIVER ROAD ALLIANCE, INC., ET AL. *v.* CORPS OF ENGINEERS OF THE UNITED STATES ARMY ET AL.; and

No. 85–800. ILLINOIS *v.* CORPS OF ENGINEERS OF THE UNITED STATES ARMY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 764 F. 2d 445.

JUSTICE WHITE, dissenting.

In 1980, respondent National Marine Service applied to respondent Army Corps of Engineers for a permit to construct a temporary barge-fleeting facility on the Mississippi River. After holding a public hearing on the environmental effects of the proposed facility, the Corps issued a brief "environmental assessment" concluding that the facility would have no significant environmental effects. Based on this conclusion, the Corps determined that it was not required to prepare an Environmental Impact Statement (EIS) on the proposed project, since such an EIS is required by the National Environmental Policy Act (NEPA), 83 Stat. 853, 42 U. S. C. §4332(2)(C), only for projects that will "significantly affec[t] the quality of the human environment." Thus, the Corps issued the permit sought.

Petitioners, the State of Illinois and others including River Road Alliance, Inc., brought suit in the United States District Court for the Southern District of Illinois, challenging the issuance of the permit and the Corps' underlying finding of no significant environmental effects. On petitioners' motion for summary judgment, the District Court found that "[w]hile paying lip service to [NEPA], the Corps has failed to take the 'hard look' required to support its conclusions, and has failed to document that 'hard look' in the Environmental Assessment . . . ." App. to Pet. for Cert. in No. 85–800, p. 33. Based on this conclusion, the District Court held that the Corps' action was arbitrary and capricious and entered judgment in favor of petitioners.

On appeal, the United States Court of Appeals for the Seventh Circuit reversed. 764 F. 2d 445 (1985). While observing that

that court had previously held that an agency's decision not to prepare an EIS is reviewed only for an abuse of discretion, see, *e. g., Wisconsin* v. *Weinberger*, 745 F. 2d 412, 417 (CA7 1984), the Court of Appeals in this case acknowledged that other Courts of Appeals have held that such decisions are reviewed for reasonableness. 764 F. 2d, at 449. Having noted these differing formulations, the Court of Appeals expressed its doubt as to the "practical difference" between the two standards: "There is plenary review and there is deferential review, and whether it is fruitful to attempt fine gradations within the second category may be doubted, though there is no need to resolve our doubt here." *Ibid.* The court then declined to substitute its judgment for the Corps' and reversed the decision of the District Court.

Although the precise contours of the Court of Appeals' review in this case are somewhat unclear, the decision below again presents to this Court the unresolved question of the standard of review to be applied by courts reviewing an agency decision not to prepare an EIS. I have noted before the divergent standards of review invoked by the various Courts of Appeals in this context, see *Gee* v. *Boyd*, 471 U. S. 1058, 1059 (1985) (dissenting from denial of certiorari), and I will not again detail the alignment of the lower courts here. I reiterate, however, my previously expressed view that "[t]his conflict is not merely semantic or academic": The courts that invoke the abuse-of-discretion or arbitrary-and-capricious standard emphasize that the decision is committed to the agency's discretion and expertise; the courts that invoke the reasonableness standard, in contrast, stress the nondiscretionary nature of NEPA's language. *Id.*, at 1060. Because this conflict among the Circuits raises a significant question as to the proper interpretation of a federal statute, because this question recurs regularly, and because I believe that the issue is not merely one of semantics, I would grant certiorari to resolve the issue.

No. 85-798. PETTY MOTOR CO. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 767 F. 2d 712.

JUSTICE WHITE, with whom THE CHIEF JUSTICE joins, dissenting.

In this case the United States Court of Appeals for the Tenth Circuit held that as a matter of federal law a United States Marshal's conducting a judicial foreclosure sale constitutes "seizing or levying" within the meaning of 28 U. S. C. § 1921.* As the Government concedes, this decision conflicts with the decisions of three Courts of Appeals that have held that costs could not be taxed under § 1921 in cases involving judicial foreclosure sales. See *Travelers Insurance Co.* v. *Lawrence*, 509 F. 2d 83 (CA9 1974); *James T. Barnes & Co.* v. *United States*, 593 F. 2d 352 (CA8 1979); *Federal Land Bank of St. Paul* v. *Hassler*, 595 F. 2d 356 (CA6 1979). I would grant certiorari to resolve this conflict.

No. 85–844. DAVIS *v.* UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 765 F. 2d 1510.

JUSTICE WHITE, dissenting.

The question presented is what statute of limitations to borrow in this suit against a union for an alleged violation of a former member's rights under § 101 of the Labor-Management Reporting and Disclosure Act, 29 U. S. C. § 411. The United States Court of Appeals for the Eleventh Circuit held that in light of *DelCostello* v. *Teamsters*, 462 U. S. 151 (1983), the appropriate source from which to borrow a limitations period is not state law but § 10(b) of the National Labor Relations Act, 29 U. S. C. § 160(b). 765 F. 2d 1510 (1985). Although not without support in other Circuits, see, *e. g.*, *Local Union 1397* v. *United Steelworkers of America, AFL–CIO*, 748 F. 2d 180 (CA3 1984), the Eleventh Circuit's decision in this case conflicts with *Doty* v. *Sewall*, 784 F. 2d 1 (CA1 1986). *Doty* explicitly rejects the analysis of this case and *Local Union 1397*, *supra*, and holds that the usual practice of borrowing statutes of limitations from state law should be followed in a suit like this one. I would grant certiorari to resolve this conflict.

No. 85–863. LUBRIZOL ENTERPRISES, INC. *v.* CANFIELD, BANKRUPTCY TRUSTEE FOR RICHMOND METAL FINISHERS, INC.

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*Title 28 U. S. C. § 1921 provides in relevant part:

"Only the following fees of United States marshals shall be collected and taxed as costs, except as otherwise provided:

. . . . .

"For seizing or levying on property (including seizures in admiralty), disposing of the same by sale, setoff, or otherwise and receiving and paying over money, commissions of 3 per centum on the first $1,000 of the amounts collected and 1½ per centum on the excess of any sum over $1,000."

C. A. 4th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 756 F. 2d 1043.

No. 85-991. IN RE MARTIN-TRIGONA. C. A. 2d Cir. Petition for writ of certiorari and/or mandamus denied. Reported below: 770 F. 2d 157.

No. 85-1053. CRAFT *v.* METROMEDIA, INC. C. A. 8th Cir. Certiorari denied. JUSTICE O'CONNOR would grant certiorari. Reported below: 766 F. 2d 1205.

No. 85-1183. P. B. C. *v.* D. H. Sup. Jud. Ct. Mass. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 396 Mass. 68, 483 N. E. 2d 1094.

No. 85-5386. FLEMING *v.* KEMP, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 748 F. 2d 1435.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

I would grant certiorari in this case because petitioner was not represented by counsel at a critical stage of a criminal proceeding, and is therefore entitled to reversal of his conviction. See *United States* v. *Cronic*, 466 U. S. 648, 659, and n. 25 (1984); *Holloway* v. *Arkansas*, 435 U. S. 475, 489 (1978).

Petitioner was convicted of murdering a police officer and sentenced to death. After exhausting state remedies, petitioner filed a petition for a writ of habeas corpus in the District Court. Petitioner contended that he had been denied counsel at a commitment hearing, a device used under Georgia law to determine the existence of probable cause to detain a suspect, Ga. Code Ann. § 17-7-23 (1982), and one that the Georgia Supreme Court has held to be a critical stage of the prosecution, *State* v. *Houston*, 234 Ga. 721, 218 S. E. 2d 13 (1975); cf. *Coleman* v. *Alabama*, 399 U. S. 1 (1970). The District Court held that the hearing that took place in this case had not been a "commitment hearing" as contemplated by state law, and that in any event petitioner had been represented by an attorney, Millard Farmer. 560 F. Supp. 525 (MD Ga. 1983). Viewing the latter question as one of fact and the District Court's resolution as not clearly erroneous, a divided Court of Appeals affirmed without considering the nature of the hearing. 748 F. 2d 1435 (CA11 1984).

Assuming for the sake of argument that the District Court's determination that attorney Farmer represented petitioner is a pure issue of fact, but see *Cuyler* v. *Sullivan*, 446 U. S. 335, 342 (1980) (whether counsel engaged in multiple representation is mixed question of law and fact), I would not hesitate to hold that finding clearly erroneous. See 748 F. 2d, at 1456 (Tuttle, J., concurring in part and dissenting in part). Petitioner, Son Fleming, was arrested along with Henry Willis and Larry Fleming, who is petitioner's nephew. Petitioner and his two codefendants requested and received separate appointed counsel. Larry Fleming's appointed counsel induced Farmer, an experienced full-time criminal attorney, to represent both Larry Fleming and Henry Willis. Farmer then requested a commitment hearing for his two clients, who, like petitioner, had been indicted for kidnaping but not yet for murder. Petitioner's counsel, who had been appointed on the kidnaping charge but not the murder charge, chose not to participate. Nevertheless, the prosecutor required petitioner to be at the hearing, at which the State introduced testimony on the kidnaping and murder charges, and permitted Farmer an opportunity to cross-examine.

The District Court found that Farmer had represented all three defendants at the hearing. It based this conclusion on the facts that the transcript showed Farmer appearing "for the defendants," *id.*, at 1444, and that the prosecutor had referred to Farmer as "counsel for the defendants," *ibid.* The District Court also gave weight to Farmer's failure to inform the court during the hearing that he was not representing all three defendants, and to his cross-examination of the State's witnesses, which related to the conduct of all three defendants.

These facts are simply insufficient to support the conclusion that Farmer represented petitioner in the face of direct evidence to the contrary. Farmer, whom the District Court characterized as an experienced criminal attorney, 560 F. Supp., at 529, testified under oath at the habeas hearing that he had not represented petitioner at the "commitment" hearing, *id.*, at 533. Petitioner's appointed attorney also believed that Farmer had not represented petitioner at the hearing. 748 F. 2d, at 1460 (Tuttle, J., concurring in part and dissenting in part). Finally, it is undisputed that the prosecutor knew before the hearing that Farmer did not represent petitioner. *Id.*, at 1459; 560 F. Supp., at 529–530.

Most importantly, Farmer could not possibly have represented petitioner without incurring an actual and substantial conflict of interest. At the time of the hearing, none of the defendants had been indicted for the murder. Petitioner had told the police that he had not participated in the killing, but instead had begged his codefendants to spare the victim's life. *Id.*, at 529. According to Larry Fleming, however, petitioner and Willis had shot the victim. 748 F. 2d, at 1460. No extended discussion is necessary to demonstrate that Farmer could not represent both petitioner and Larry Fleming under those circumstances. Petitioner thus had either no counsel or counsel who "actively represented conflicting interests," *Cuyler*, *supra*, at 350. In either event, reversal is automatic. *Holloway*, *supra*, at 489; *Cuyler*, *supra*, at 349–350.

The District Court's determination that the hearing in this case was not a critical stage is even less persuasive. The District Court concluded that there had been no need for a commitment hearing because all three defendants could legally have been detained on the kidnaping charges. Moreover, the Justice of the Peace had made no probable-cause determination, as he presumably would have following a commitment hearing. The District Court therefore chose to characterize the hearing as "an agreed upon discovery conference." 560 F. Supp., at 533. Sixth Amendment rights, however, do not turn upon how a proceeding is characterized for purposes of state law, or indeed upon whether state law expressly mandates such a proceeding. *Coleman* v. *Alabama*, *supra*, at 8 (plurality opinion). The critical inquiry is whether "counsel's absence might derogate from the accused's right to a fair trial." *United States* v. *Wade*, 388 U. S. 218, 226 (1967) (footnote omitted).

The hearing in this case was unquestionably a critical stage within the meaning of *Wade* and *Coleman*. As Judge Tuttle observed, the hearing was petitioner's first opportunity to cross-examine the State's witnesses. 748 F. 2d, at 1457. Thus the plurality's observations in *Coleman*, *supra*, at 9, are equally relevant here:

> "[T]he skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. . . . [T]rained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial."

Petitioner therefore had a Sixth Amendment right to counsel at the hearing, no matter what that hearing was called or why Farmer requested it. The District Court's determination that Farmer represented petitioner is either contrary to law or clearly erroneous. I would grant the petition for certiorari and set the case for hearing on the merits.

No. 85-6166. CUPPAY *v.* BLACKBURN, WARDEN, ET AL. C. A. 5th Cir. Motion of petitioner to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 778 F. 2d 788.

Rehearing Denied

No. 84-1361. UNITED STATES *v.* LOUD HAWK ET AL., 474 U. S. 302;

No. 85-613. COMMUNITY HEALTH SERVICES OF CRAWFORD COUNTY, INC. *v.* TRAVELERS INSURANCE COS. ET AL., 474 U. S. 1056;

No. 85-787. DAVES *v.* STATE BAR OF TEXAS, 474 U. S. 1043;

No. 85-813. MINNESOTA TIMBER PRODUCERS ASSN., INC. *v.* AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON, 474 U. S. 1059;

No. 85-820. NORWOOD *v.* INA LIFE INSURANCE CO. ET AL., 474 U. S. 1059;

No. 85-5372. LEVITT *v.* MONROE ET AL., 474 U. S. 1034;

No. 85-5380. JACKSON *v.* GENERAL DYNAMICS, INC., 474 U. S. 1063;

No. 85-5439. JOHNSON *v.* MANSON, COMMISSIONER OF CORRECTIONS OF CONNECTICUT, 474 U. S. 1063; and

No. 85-5679. PASKULY *v.* MARSHALL FIELD & CO., 474 U. S. 1064. Petitions for rehearing denied.

No. 85-5738. Cossett et al. *v.* Ledford, Trustee, 474 U. S. 1065;

No. 85-5764. Sellner *v.* Maryland, 474 U. S. 1066;

No. 85-5839. Gray *v.* Department of Transportation, Federal Aviation Administration, 474 U. S. 1069; and

No. 85-5889. Rispoli *v.* United States et al., 474 U. S. 1069. Petitions for rehearing denied.

No. 85-773. Atlantic Richfield Co. et al. *v.* Alaska et al., 474 U. S. 1043. Petition for rehearing denied. Justice Powell took no part in the consideration or decision of this petition.

March 6, 1986

Miscellaneous Order

No. A-653 (85-6448). Adams *v.* Wainwright, Secretary, Florida Department of Corrections, et al. Sup. Ct. Fla. The order of February 28, 1986 [*ante*, p. 1041], is vacated. The application for stay of execution of sentence of death, presented to Justice Powell, and by him referred to the Court, is granted until March 25, 1986, or until the disposition by this Court of the petition for writ of certiorari, whichever is earlier, unless otherwise extended by the Court. Justice Rehnquist and Justice O'Connor would deny the application for stay.

March 10, 1986*

Appeals Dismissed

No. 85-353. Michigan Diversified Business Products, Inc., et al. *v.* City of Warren et al. Appeal from Ct. App. Mich. dismissed for want of properly presented federal question. Justice Stevens would note probable jurisdiction and set case for oral argument.

No. 85-1185. Wheaton *v.* City of Oklahoma City et al. Appeal from Ct. Crim. App. Okla. dismissed for want of substantial federal question.

No. 85-1211. Rajaram *v.* A. S. Abell Publishing Co. Appeal from Ct. Sp. App. Md. dismissed for want of jurisdiction.

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*Justice Brennan took no part in the consideration or decision of the orders announced on this date with the exception of No. 85-6333, *Egger* v. *Casey, Director, Central Intelligence Agency, et al.*, *infra*, p. 1064.

Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85-6206. GAYDOS *v.* STRELECKI ET AL. Appeal from C. A. 3d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 774 F. 2d 1151.

Certiorari Granted—Vacated and Remanded

No. 85-498. ABERNATHY ET AL. *v.* SAN JOSE TEACHERS ASSN. Sup. Ct. Cal. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Teachers* v. *Hudson, ante*, p. 292. Reported below: 38 Cal. 3d 839, 700 P. 2d 1252.

Vacated and Remanded After Certiorari Granted

No. 85-298. CONNOLLY *v.* BURT. C. A. 10th Cir. [Certiorari granted, 474 U. S. 1004.] Judgment vacated and case remanded to the Court of Appeals with directions that it instruct the United States District Court for the District of Colorado to dismiss the complaint as moot.

*Miscellaneous Orders**

No. — – ——. ELMWOOD-UTICA HOUSES, INC. *v.* BUFFALO SEWER AUTHORITY. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. D-547. IN RE DISBARMENT OF MAGRUDER. It is ordered that R. Jack Magruder III, of Little Rock, Ark., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 85-701. FEDERAL ELECTION COMMISSION *v.* MASSACHUSETTS CITIZENS FOR LIFE, INC. C. A. 1st Cir. [Probable jurisdiction noted, 474 U. S. 1049.] Motion of Common Cause for leave to file a brief as *amicus curiae* granted.

No. 85-782. IMMIGRATION AND NATURALIZATION SERVICE *v.* CARDOZA-FONSECA. C. A. 9th Cir. [Certiorari granted, *ante*, p. 1009.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

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*For the Court's order prescribing amendments to the Federal Rules of Appellate Procedure, see *post*, p. 1155.

No. 85–6124. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner to consolidate this case with No. 85–5189, *McLaughlin* v. *United States* [certiorari granted, 474 U. S. 944], denied.

No. 85–6333. EGGER *v.* CASEY, DIRECTOR, CENTRAL INTELLIGENCE AGENCY, ET AL. C. A. D. C. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until March 31, 1986, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 85–6236. IN RE TUCKER. Petition for writ of mandamus denied.

Certiorari Granted

No. 85–1217. CITY OF SPRINGFIELD, MASSACHUSETTS *v.* KIBBE, ADMINISTRATRIX OF THE ESTATE OF THURSTON. C. A. 1st Cir. Certiorari granted. Reported below: 777 F. 2d 801.

Certiorari Denied. (See also Nos. 85–1211 and 85–6206, *supra.*)

No. 84–6050. CURTIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 742 F. 2d 1070.

No. 85–542. ROTH ET AL. *v.* CITY OF VALLEJO. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 167 Cal. App. 3d 1169, 213 Cal. Rptr. 143.

No. 85–697. WAGGONER ET AL. *v.* DALLAIRE, DBA A-JAY EXCAVATING CO. C. A. 9th Cir. Certiorari denied. Reported below: 767 F. 2d 589.

No. 85–855. ARKLA, INC. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 765 F. 2d 487.

No. 85–891. SMITH, AS PERSONAL REPRESENTATIVE OF THE ESTATES OF AUSTIN ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON (UNITED STATES, REAL PARTY IN INTEREST); and SMITH, AS PERSONAL REPRESENTATIVE OF THE ESTATES OF AUSTIN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 85-951. ROBINSON ET AL. *v.* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 769 F. 2d 1556.

No. 85-1036. RUTGERS STATE UNIVERSITY OF NEW JERSEY ET AL. *v.* GALDA ET AL.; and

No. 85-1037. NEW JERSEY PUBLIC INTEREST RESEARCH GROUP, INC. *v.* GALDA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 772 F. 2d 1060.

No. 85-1052. KUPFERSTEIN *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 85-1145. WILLIAMS ET AL. *v.* WOLFENBARGER, DBA SHADY SAM'S PAWN SHOP; and

No. 85-1203. TANNERY ET AL. *v.* WOLFENBARGER, DBA SHADY SAM'S PAWN SHOP. C. A. 10th Cir. Certiorari denied. Reported below: 774 F. 2d 358.

No. 85-1178. CHATTEM, INC. *v.* BAILEY. C. A. 6th Cir. Certiorari denied. Reported below: 779 F. 2d 49.

No. 85-1182. HUMBLE EXPLORATION CO., INC., ET AL. *v.* BROWNING ET AL. Ct. App. Tex., 5th Sup. Jud. Dist. Certiorari denied. Reported below: 690 S. W. 2d 321.

No. 85-1193. MAGEE, INDIVIDUALLY AND T/A COLLEGIATE RESEARCH SYSTEMS *v.* RUVOLDT, PROSECUTOR OF HUDSON COUNTY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 85-1202. BRADFORD, AS EXECUTRIX OF THE ESTATE OF BRADFORD *v.* BLUE PEARL MUSIC CORP. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1067.

No. 85-1204. TERRY *v.* STONE ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 85-1212. OLEN *v.* PURDUE ET AL. Ct. App. Ariz. Certiorari denied.

No. 85-1215. GATES *v.* SPINKS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 771 F. 2d 916.

No. 85–1216. O'CONNELL *v.* MARYLAND STEEL ERECTORS, INC., ET AL. Ct. App. D. C. Certiorari denied. Reported below: 495 A. 2d 1134.

No. 85–1220. HUGH KNOELL BUILDERS, INC. *v.* FIRST FEDERAL SAVINGS & LOAN ASSN. Ct. App. Ariz. Certiorari denied.

No. 85–1241. LUBBOCK COUNTY, TEXAS, ET AL. *v.* STEWART ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 767 F. 2d 153.

No. 85–1258. BROWN ET AL. *v.* KERR-MCGEE CHEMICAL CORP. C. A. 7th Cir. Certiorari denied. Reported below: 767 F. 2d 1234.

No. 85–1330. WILLIAMS ROCK MINING CO., INC. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 782 F. 2d 1048.

No. 85–5623. WOLFE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 766 F. 2d 1525.

No. 85–5879. UNGAR *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 63 Md. App. 472, 492 A. 2d 1336.

No. 85–6037. AMES *v.* NEW YORK STATE DIVISION OF PAROLE. C. A. 2d Cir. Certiorari denied. Reported below: 772 F. 2d 13.

No. 85–6120. POWELL *v.* DUGGER, SUPERINTENDENT, FLORIDA STATE PRISON. C. A. 11th Cir. Certiorari denied.

No. 85–6151. GIRDNER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 773 F. 2d 257.

No. 85–6186. TUCKER ET AL. *v.* MASCHNER, WARDEN, ET AL. Sup. Ct. Kan. Certiorari denied.

No. 85–6192. TAYLOR *v.* BOOKER, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 779 F. 2d 47.

No. 85–6194. RODMAN *v.* REED ET AL. C. A. 6th Cir. Certiorari denied.

No. 85–6196. PARKER *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 85-6197. SMITH *v.* DEBARTOLI. C. A. 7th Cir. Certiorari denied. Reported below: 769 F. 2d 451.

No. 85-6201. PRANTIL *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 169 Cal. App. 3d 592, 215 Cal. Rptr. 372.

No. 85-6208. BORGE *v.* BOYS AND GIRLS CLUBS OF GREATER WASHINGTON. C. A. D. C. Cir. Certiorari denied. Reported below: 251 U. S. App. D. C. 196, 782 F. 2d 278.

No. 85-6211. MOORE *v.* WELLS, SUPERINTENDENT, MUSKEGON CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 780 F. 2d 1022.

No. 85-6212. SMIGA *v.* DEAN WITTER REYNOLDS, INC. C. A. 2d Cir. Certiorari denied. Reported below: 766 F. 2d 698.

No. 85-6215. BRENNAN *v.* HABERSHAW ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 777 F. 2d 702.

No. 85-6218. GASPARD *v.* TRANSWORLD DRILLING CO. Sup. Ct. La. Certiorari denied. Reported below: 474 So. 2d 1304.

No. 85-6231. SOMMER *v.* CLINTON COUNTY SUPREME COURT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 39.

No. 85-6237. TOMAS ET AL. *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 136 Ill. App. 3d 1054, 484 N. E. 2d 341.

No. 85-6239. ROBERTS *v.* DILL. C. A. 8th Cir. Certiorari denied. Reported below: 782 F. 2d 1049.

No. 85-6242. HOWARD *v.* DAVIS, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 85-6246. WILLIAMS *v.* STATE AUTOMOBILE MUTUAL INSURANCE CO. Ct. App. Ohio, Lawrence County. Certiorari denied.

No. 85-6247. MCGEE *v.* SCREW CONVEYOR CORPORATION OF WINONA, MISSISSIPPI. C. A. 5th Cir. Certiorari denied. Reported below: 777 F. 2d 699.

No. 85–6249. MIDWIFE *v.* SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 85–6255. BARTLEY *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 109 Ill. 2d 273, 486 N. E. 2d 880.

No. 85–6267. GRANT *v.* ABSHIRE, SUPERINTENDENT, RIVERSIDE CORRECTIONAL FACILITY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 774 F. 2d 1162.

No. 85–6298. HUGGARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 778 F. 2d 788.

No. 85–6328. RIVERA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 778 F. 2d 591.

No. 85–6331. CAROTHERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 785 F. 2d 311.

No. 85–6336. BERO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 782 F. 2d 1044.

No. 85–6339. AGILAR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 123.

No. 85–6353. DENNIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 85–6358. JENKS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 774 F. 2d 1156.

No. 85–6370. AGUIRRE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 85–337. KEMP, WARDEN *v.* POTTS. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 734 F. 2d 526 and 764 F. 2d 1369.

CHIEF JUSTICE BURGER, with whom JUSTICE REHNQUIST joins, dissenting from the denial of certiorari.

Eleven years ago, while in Cobb County, Georgia, Potts and a female companion persuaded Robert Snyder to give them a ride in a pickup truck. After Snyder agreed, Potts shot him through the left ear and nose with a pistol. Snyder acted as if he were unconscious while Potts dragged him out of the truck. Potts robbed

Snyder and then, unable to start the truck, walked to a nearby home. There he told Michael Priest that an accident had occurred. Priest drove Potts back to the truck. Upon their arrival, Priest saw Snyder lying in a ditch and attempted to help him. But Potts ordered Priest to drive him and his companion to the next county, Forsyth County. Once there, he forced Priest out of the car at gunpoint. Priest said, "Oh my God, don't kill me"; Potts retorted that there was no such thing as God, and that he would determine whether Priest would live or die. Potts then put a gun to Priest's head and killed him.

Potts was convicted in the Superior Court of Cobb County of kidnaping Priest with bodily injury, armed robbery of Priest, and armed robbery and aggravated assault of Snyder. Potts was sentenced to death for the kidnaping and for the armed robbery. He was subsequently tried in the Superior Court of Forsyth County for the murder of Priest and received another death sentence. Potts' convictions and sentences were affirmed by the Georgia Supreme Court, although the court vacated Potts' death sentence for armed robbery. *Potts* v. *State*, 241 Ga. 67, 69, 243 S. E. 2d 510, 514 (1978). He then sought and was denied state habeas relief.

Potts next sought a writ of habeas corpus in the United States District Court for the Northern District of Georgia. The District Court ordered a new guilt/innocence trial with respect to the Cobb County kidnaping conviction and a new sentencing trial with respect to the Forsyth County murder conviction. 575 F. Supp. 374 (1983). The Court of Appeals for the Eleventh Circuit affirmed. 734 F. 2d 526 (1984).

Potts' federal habeas petition contained several issues that had never been presented to the Georgia state courts; for the first time in his petition, he argued that he was denied effective assistance of counsel. This issue had not been raised on direct appeal or on state habeas. Indeed, in the District Court Potts moved to amend his federal habeas petition to include this new claim. The State contended that Potts had not exhausted his state remedies, citing this Court's opinion in *Rose* v. *Lundy*, 455 U. S. 509 (1982). The District Court nonetheless granted the motion to amend, stating that it was "hard pressed to see how [the State] would be prejudiced by the granting of the . . . motion." Of course, this was a wholly insufficient basis for ignoring the requirement of exhaustion of state remedies made explicit in *Lundy*. There we explained that the exhaustion requirement is designed not only to avoid prejudice to state prosecutors but also "to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings." *Id.*, at 518.

In his federal habeas petition, Potts also argued that the trial court erred in not instructing the jury that "bodily injury" was an element of the crime of capital kidnaping. From an examination of the record lodged with this Court, it seems clear that this issue was not presented to the Georgia Supreme Court either on direct appeal from the conviction or in the state habeas petition. Thus, Potts had not exhausted his state remedies when he sought federal habeas relief on this basis. Nonetheless, both the District Court and the Court of Appeals granted relief on this claim without giving the Georgia state courts any opportunity to review it.

Apart from the unnecessary "disruption of state-court proceedings" created by this failure to require Potts to exhaust state remedies, the record that resulted is unusual in several respects. For example, the Court of Appeals embarked on an extended discussion of the meaning of the Georgia capital kidnaping statute without the benefit and guidance of a prior Georgia court construction of the statute in light of Potts' objection. 734 F. 2d, at 529–530. Obviously our decision, and the decision of the court below, would have been aided by such a construction.

The Court of Appeals also acknowledged after parsing the Cobb County jury verdict that "there is . . . some degree of uncertainty as to what the Cobb County jury intended to find with regard to the kidnapping charge." *Id.*, at 530. The court nevertheless confidently declared that the jury had never found "bodily injury" because of defective instructions. The federal question presented on a challenge such as this is "'whether the ailing instruction *by itself* so infected the entire trial that the resulting conviction violates due process,' . . . not merely whether 'the instruction is undesirable, erroneous, or even "universally condemned."'" *Henderson* v. *Kibbe*, 431 U. S. 145, 154, and 157 (1977) (emphasis added) (quoting *Cupp* v. *Naughten*, 414 U. S. 141, 147 (1973)). Of course the Georgia state courts, familiar as they are with the nuances of trial procedure in that State, are in a far better position to decide such a question in the first instance than is the Court of Appeals.

By allowing Potts to raise these issues for the first time in his federal habeas petition, the Court of Appeals also effectively circumvented sound state procedural rules that may have been applicable. Although the trial transcript is not part of the record lodged with this Court, it seems apparent that Potts never contested that the kidnaping here did in fact end with bodily injury. After all, Mr. Priest was found shortly after Potts had kidnaped him—not merely injured, but dead with a bullet through his head—and the whole record here is filled with evidence of mayhem. Accordingly, if the trial court's instructions were in any way defective on need for a jury finding of "bodily injury," it seems extremely unlikely that Potts objected. Indeed, he may have even invited the error or made a tactical decision not to object for the purpose of diverting the jury's attention from the obvious injury that resulted. In such circumstances, the state court might well and properly have concluded that Potts was procedurally barred from raising this claim, had he been required to proceed there first. Such a conclusion could have precluded federal-court review of this issue entirely since generally "if a defendant has an objection, there is an obligation to call the matter to the court's attention so the trial judge will have an opportunity to remedy the situation." *Estelle* v. *Williams*, 425 U. S. 501, 508, n. 3 (1976). This possibility was foreclosed by the Court of Appeals' hasty consideration of Potts' claim. The correct course, clearly mandated by our prior opinions, was to give the Georgia state courts "first crack" at Potts' constitutional objections.

"The exhaustion doctrine seeks to afford the state courts a meaningful opportunity to consider allegations of legal error without interference from the federal judiciary." *Vasquez* v. *Hillery*, 474 U. S. 254, 257 (1986). Because the District Court and the Court of Appeals entertained a petition contrary to established law, I would vacate and remand with instructions to dismiss the petition to "'allo[w] the State an initial opportunity to pass upon and correct alleged violations of [Potts'] federal rights.'" *Lundy*, *supra*, at 518 (quoting *Duckworth* v. *Serrano*, 454 U. S. 1, 3 (1981)). We have followed essentially this procedure in other cases when we discovered that a petitioner has obtained relief on an unexhausted claim. See, *e. g.*, *Bergman* v. *Burton*, 456 U. S. 953 (1982) (after discovering exhaustion problem, vacating and remanding for reconsideration in light of *Lundy*). Accordingly, I dissent from the Court's denial of certiorari.

No. 85-684. KRAMER *v.* PUBLIC EMPLOYMENT RELATIONS COMMISSION. Sup. Ct. N. J. Certiorari denied. JUSTICE BLACKMUN would grant the petition for writ of certiorari, vacate the judgment, and remand the case for further consideration in light of *Teachers* v. *Hudson, ante,* p. 292. Reported below: 99 N. J. 523, 494 A. 2d 279.

Rehearing Denied

No. 85-748. KELLER *v.* UNITED STATES, 474 U. S. 1082;

No. 85-790. CUDDY *v.* CARMEN, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, 474 U. S. 1034;

No. 85-5360. DARWIN *v.* UNITED STATES, 474 U. S. 1110;

No. 85-5619. CAMPBELL *v.* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, 474 U. S. 1084; and

No. 85-5885. TUCKER *v.* UNITED STATES, 474 U. S. 1085. Petitions for rehearing denied.

No. 85-5352. SANDERS *v.* JUNIOR COLLEGE DISTRICT OF METROPOLITAN KANSAS CITY, MISSOURI, 474 U. S. 922; and

No. 85-5413. PETRILLO *v.* NEW JERSEY, 474 U. S. 922. Motions for leave to file petitions for rehearing denied.

MARCH 11, 1986

Miscellaneous Order

No. A-691. BASS *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death scheduled for Wednesday, March 12, 1986, presented to JUSTICE WHITE, and by him referred to the Court, denied.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia,* 428 U. S. 153, 227 (1976), I would grant the application for a stay and a petition for certiorari, and vacate the death sentence in this case. However, even if I did not hold this view, I would grant this application.

The Court of Appeals rejected applicant's conflict-of-interest claim with regard to attorney Sanders based on the trial court's finding that Sanders had not acted as applicant's trial counsel.

784 F. 2d 658 (1986). However, because the determination whether Sanders acted as applicant's counsel presents a mixed question of fact and law, we are not obliged, as the Court of Appeals apparently believed, simply to defer to the trial court's finding. Cf. *Cuyler* v. *Sullivan*, 446 U. S. 335, 342 (1980) (state court's holding that lawyers had not engaged in multiple representation is mixed question of fact and law).

Sanders represented applicant when he contested extradition from Kentucky to Texas. Upon extradition, the trial court appointed Victor Blaine, a Texas attorney, to represent applicant. However, Sanders continued to play an active role in the case. First, Sanders appeared as *amicus curiae* in support of applicant's motion for a continuance to allow applicant to obtain substitute counsel. Sanders had apparently obtained an agreement from an outside organization to provide applicant with substitute counsel if a continuance could be secured. Second, when applicant balked at testifying at trial without first consulting Sanders, Sanders urged applicant to follow Blaine's advice and to take the stand in his defense. Third, Sanders and Blaine had frequent and direct communication in writing and by telephone, although the trial court characterized the bulk of these as "non-controversial." Fourth, after applicant complained to Sanders about his inability to communicate with Blaine, Sanders gave applicant advice on how to document his complaints with a view towards seeking Blaine's removal or a continuance to obtain new counsel. Fifth, Sanders appeared as *amicus curiae* and filed a motion for reconsideration of applicant's appeal of his conviction. Sixth, Sanders did represent applicant when he filed his petition for certiorari to this Court. Based on these facts, applicant raises a serious question as to whether Sanders was in fact his attorney for purposes of the Sixth Amendment right to effective assistance of counsel. While Sanders did not formally conduct applicant's trial, applicant relied on Sanders' advice in making critical decisions throughout the proceedings. If Sanders was acting as applicant's attorney, Sanders' alleged conflict of interest may have deprived applicant of the effective assistance of counsel under *Cuyler*, *supra*. I would therefore grant the application for a stay in order to provide applicant with time to prepare and file a petition for a writ of certiorari raising this issue.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976), I would grant the application for stay in order to give the applicant time to file a petition for writ of certiorari, and would grant the petition and vacate the death sentence in this case.

MARCH 13, 1986

Dismissal Under Rule 53

No. 85–1361. UNITED GAS PIPE LINE CO. *v.* CITY OF NEW ORLEANS ET AL. Sup. Ct. La. Certiorari dismissed under this Court's Rule 53. Reported below: 478 So. 2d 144.

MARCH 18, 1986

Miscellaneous Orders

No. A–710 (85–6545). JAMES *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Fla. Application for stay of execution of sentence of death scheduled for Wednesday, March 19, 1986, presented to JUSTICE POWELL, and by him referred to the Court, is granted until April 7, 1986, or until the disposition by this Court of the petition for writ of certiorari, whichever is earlier, unless otherwise extended by the Court. THE CHIEF JUSTICE, JUSTICE WHITE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR would deny the application for stay.

No. A–711 (85–6547). HARICH *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Fla. Application for stay of execution of sentence of death scheduled for Wednesday, March 19, 1986, presented to JUSTICE POWELL, and by him referred to the Court, denied.

JUSTICE POWELL, concurring.

The other capital case in which execution was scheduled for tomorrow is *James* v. *Wainwright*, *ante* this page. I voted to grant a stay of execution in that case. Both *James* and this case profess to present claims similar to that pending before the Court in *Lockhart* v. *McCree*, No. 84–1865.

This case, however, presents an issue different from *James* and one without merit. In *James*, the *Lockhart* issue was at least arguably presented when persons on the venire who expressed reservations as to capital punishment were removed by peremptory challenges. In this case, applicant "conced[ed] in this petition [before the Supreme Court of Florida] that at his trial 'no veniremen were excluded' during *voir dire*, either for cause or through peremptory challenge." *Harich* v. *Wainwright*, 484 So. 2d 1237 (1986). Similarly, before this Court applicant makes no allegation that persons on the venire were excluded during *voir dire* because of any objections to capital punishment.

Accordingly, my vote is to deny the application for a stay of execution.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant the application for stay and the petition for writ of certiorari, and vacate the death sentence in this case.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Four Justices of this Court have voted to defer consideration of the petition for certiorari accompanying this application for a stay pending our decision in *Lockhart* v. *McCree*, No. 84-1865. Applicant has raised a claim that would be directly affected by the decision in *McCree*. Although no prospective juror in this case was actually stricken because of expressed scruples against the death penalty, applicant alleges that the jurors' exposure to *voir dire* on their willingness to inflict the death penalty rendered them more likely to convict him. This is identical to a claim at issue in *McCree*. It is also identical to claims raised in *James* v. *Wainwright*, *ante*, p. 1074, and *Adams* v. *Wainwright*, *ante*, p. 1062, both of which were stayed by this Court, the former only hours ago. James, like applicant, relied solely on the jurors' exposure to death qualification; he nowhere claimed that the exclusion of jurors via peremptory strikes brought his case within the scope of *McCree*. See Pet. for Cert. in No. 85-6545, pp. 6-13. Although this Court has deferred consideration of numerous other petitions for certiorari pending our decision in *McCree*, and has issued stays of execution where necessary to permit this deferral, the Court inexplicably refuses to treat the case before us as we have treated these others.

More alarming is the Court's disregard of its own procedures in this case. Because at least three Justices have voted to defer consideration of the petition pending *McCree*, the Court has not, nor under its own procedures can it, dispose of the petition for certiorari. Thus, applicant is in the unusual and manifestly unfair position of facing execution before this Court has considered his petition. This Court has shown a bizarre willingness to ignore standard procedures as it pleases in order to bring about speedy executions. I can only lament this Court's own special contribution to the arbitrariness and freakishness that continues to characterize the implementation of the death penalty.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

Because the Court has not yet acted on the petition for a writ of certiorari, I would stay applicant's execution until that petition is decided.

MARCH 20, 1986

Miscellaneous Order

No. A-721 (85-6557). JONES *v.* SMITH, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Application for stay of execution of sentence of death scheduled for Friday, March 21, 1986, presented to JUSTICE POWELL, and by him referred to the Court, denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application for stay.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant the application for stay and the petition for writ of certiorari, and vacate the death sentence in this case.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Petitioner is scheduled to be executed at 12:01 tomorrow morning. In his application for a stay and petition for writ of habeas corpus, he claims that the death-qualification of his jury and the consequent exclusion for cause of one prospective juror from the panel because of her opposition to the death penalty deprived him of his right to an impartial jury and his right to a jury selected from a representative cross section of the community in violation of the Sixth and Fourteenth Amendments. A case raising an identical claim is now pending before this Court. *Lockhart* v. *McCree*, No. 84-1865.

The District Court denied the petition and denied a certificate of probable cause. It found that petitioner had abused the writ, that petitioner's claims were procedurally barred, and, in any event, that these claims were meritless. The Court of Appeals for the Eleventh Circuit denied petitioner's application for a certificate of probable cause and a stay of execution, finding his claims to lack merit. 772 F. 2d 668 (1985).

Three times in the past six months a stay of execution has been granted in virtually identical circumstances. See *Bowden* v. *Kemp*, 474 U. S. 891 (1985); *Moore* v. *Blackburn*, No. A-261 (85-5555), Oct. 4, 1985; *Celestine* v. *Blackburn*, 473 U. S. 938 (1985). In light of the disposition of those applications, I can see no justification whatever for the Court's action today. As I noted only two days ago: "I can only lament this Court's own special contribution to the arbitrariness and freakishness that continues to characterize the implementation of the death penalty." *Harich* v. *Wainwright*, *ante*, at 1076.

MARCH 24, 1986

Appeals Dismissed

No. 85-1256. COMSTOCK *v.* HARRIS COUNTY, TEXAS. Appeal from Ct. App. Tex., 14th Sup. Jud. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 687 S. W. 2d 419.

No. 85-5400. ANDERSON *v.* DISTRICT COURT OF JEFFERSON COUNTY ET AL. Appeal from Sup. Ct. Colo. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85-6307. EIGENMAN *v.* CALIFORNIA. Appeal from App. Dept., Super. Ct. Cal., County of Tulare, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85-1271. Covenant Community Church *v.* Lowe, Knox County Clerk. Appeal from Sup. Ct. Tenn. dismissed for want of substantial federal question. Reported below: 698 S. W. 2d 339.

No. 85-1275. York *v.* Office of Disciplinary Counsel of the Supreme Court of Ohio. Appeal from Sup. Ct. Ohio dismissed for want of substantial federal question. Reported below: 19 Ohio St. 3d 150, 483 N. E. 2d 1179.

No. 85-1296. Rosenbaum *v.* Rosenbaum. Appeal from App. Ct. Ill., 1st Dist., dismissed for want of substantial federal question. Reported below: 131 Ill. App. 3d 1164, 493 N. E. 2d 1223.

No. 85-1311. Green et al. *v.* West Virginia Department of Human Services. Appeal from Cir. Ct. W. Va., Jefferson County, dismissed for want of substantial federal question.

No. 85-6217. Rederth *v.* South Dakota. Appeal from Sup. Ct. S. D. dismissed for want of substantial federal question. Reported below: 376 N. W. 2d 579.

Certiorari Granted—Vacated and Remanded

No. 85-23. Maryland *v.* Lodowski. Ct. App. Md. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Moran* v. *Burbine*, *ante*, p. 412. Reported below: 302 Md. 691, 490 A. 2d 1228.

No. 85-1074. Florida *v.* Haliburton. Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Moran* v. *Burbine*, *ante*, p. 412. Reported below: 476 So. 2d 192.

Miscellaneous Orders

No. — —. Fitzgerald *v.* City of Philadelphia. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. A-599 (85-1455). Prado *v.* United States. C. A. 5th Cir. Application for stay, addressed to Justice Stevens and referred to the Court, denied.

No. A-668 (85-1468). Woods *v.* Superior Court of California, County of Alameda (Jones, Real Party in Inter-

EST). Ct. App. Cal., 1st App. Dist. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A-709. MILLER ET AL. *v.* HIGGS ET AL. Application to continue the stay of mandate of the Supreme Court of Colorado, presented to JUSTICE WHITE, and by him referred to the Court, denied.

No. D-123. IN RE DISBARMENT OF CHVOSTA. Disbarment entered. [For earlier order herein, see 434 U. S. 979.]

No. D-404. IN RE DISBARMENT OF MIRRER. Disbarment entered. [For earlier order herein, see 465 U. S. 1063.]

No. D-541. IN RE DISBARMENT OF BOULDING. Disbarment entered. [For earlier order herein, see 474 U. S. 1044.]

No. D-548. IN RE DISBARMENT OF MARBLE. It is ordered that John Harrison Marble, of Cincinnati, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-549. IN RE DISBARMENT OF DUKE. It is ordered that Charles Louis Duke, of Houston, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 105, Orig. KANSAS *v.* COLORADO. Motion for leave to file bill of complaint granted. Defendant is allowed 60 days within which to file an answer.

No. 84-6075. TISON *v.* ARIZONA (two cases). Sup. Ct. Ariz. [Certiorari granted, *ante*, p. 1010.] Motions for appointment of counsel granted, and it is ordered that Alan M. Dershowitz, Esquire, of Cambridge, Mass., be appointed to serve as counsel for petitioners in these cases.

No. 85-246. UNITED STATES *v.* DION. C. A. 8th Cir. [Certiorari granted, 474 U. S. 900.] Motion of the Solicitor General to permit Jeffrey P. Minear, Esquire, to present oral argument *pro hac vice* granted.

No. 85-499. PAPASAN, SUPERINTENDENT OF EDUCATION, ET AL. *v.* ALLAIN, GOVERNOR OF MISSISSIPPI, ET AL. C. A. 5th Cir.

[Certiorari granted, 474 U. S. 1004.] Motion of the Attorney General of Mississippi to strike brief of respondents Dick Molpus, Secretary of State of Mississippi, et al., denied.

No. 85-519. RANDALL ET AL. *v.* LOFTSGAARDEN ET AL. C. A. 8th Cir. [Certiorari granted, 474 U. S. 978.] Motion of petitioners for divided argument denied.

No. 85-954. JAPAN WHALING ASSN. ET AL. *v.* AMERICAN CETACEAN SOCIETY ET AL.; and
No. 85-955. BALDRIGE, SECRETARY OF COMMERCE, ET AL. *v.* AMERICAN CETACEAN SOCIETY ET AL. C. A. D. C. Cir. [Certiorari granted, 474 U. S. 1053.] Motion of the Solicitor General for divided argument granted.

No. 85-6314. IN RE BONDURANT. Petition for writ of habeas corpus denied.

No. 85-6263. IN RE GALBREATH;
No. 85-6279. IN RE COLBERT; and
No. 85-6287. IN RE BOUDETTE. Petitions for writs of mandamus denied.

No. 85-6320. IN RE MACGUIRE. Petition for writ of prohibition denied.

Probable Jurisdiction Noted

No. 84-2022. 324 LIQUOR CORP., DBA YORKSHIRE WINE & SPIRITS *v.* MCLAUGHLIN ET AL. Appeal from Ct. App. N. Y. Probable jurisdiction noted. Reported below: 64 N. Y. 2d 504, 479 N. E. 2d 779.

Certiorari Granted

No. 85-608. ILLINOIS *v.* KRULL ET AL. Sup. Ct. Ill. Certiorari granted. Reported below: 107 Ill. 2d 107, 481 N. E. 2d 703.

No. 85-1088. BURLINGTON NORTHERN RAILROAD CO. *v.* WOODS ET AL. C. A. 11th Cir. Certiorari granted.

No. 85-1092. KEYSTONE BITUMINOUS COAL ASSN. ET AL. *v.* DUNCAN, SECRETARY, PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 771 F. 2d 707.

No. 85-1226. COMMISSIONER OF INTERNAL REVENUE *v.* GROETZINGER. C. A. 7th Cir. Certiorari granted. Reported below: 771 F. 2d 269.

No. 85-792. Interstate Commerce Commission *v.* Brotherhood of Locomotive Engineers et al.; and

No. 85-793. Missouri-Kansas-Texas Railroad Co. *v.* Brotherhood of Locomotive Engineers et al. C. A. D. C. Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 245 U. S. App. D. C. 311, 761 F. 2d 714.

No. 85-889. Colorado *v.* Bertine. Sup. Ct. Colo. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 706 P. 2d 411.

No. 85-1233. International Paper Co. *v.* Ouellette et al. C. A. 2d Cir. Certiorari granted. The Solicitor General is invited to file a brief in this case expressing the views of the United States. Reported below: 776 F. 2d 55.

Certiorari Denied. (See also Nos. 85-1256, 85-5400, and 85-6307, *supra.*)

No. 85-24. Maryland *v.* ElFadl. Ct. Sp. App. Md. Certiorari denied. Reported below: 61 Md. App. 132, 485 A. 2d 275.

No. 85-552. Sakamoto et al. *v.* Duty Free Shoppers, Ltd., et al. C. A. 9th Cir. Certiorari denied. Reported below: 764 F. 2d 1285.

No. 85-705. Molt *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 772 F. 2d 366.

No. 85-874. Hackney, Inc., et al. *v.* Brock, Secretary of Labor. C. A. 10th Cir. Certiorari denied. Reported below: 769 F. 2d 650.

No. 85-902. Interfirst Bank Dallas, N. A. *v.* United States et al. C. A. 5th Cir. Certiorari denied. Reported below: 769 F. 2d 299.

No. 85-913. Resha et al. *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 767 F. 2d 285.

No. 85-1007. DiCaro *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 772 F. 2d 1314.

No. 85-1051. Roe *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 775 F. 2d 43.

No. 85-1063. Lizza Industries, Inc. *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 775 F. 2d 492.

No. 85-1079. American Pouch Food Co., Inc. *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 769 F. 2d 1190.

No. 85-1082. Holbrock *v.* Young, Judge, Warren County Common Pleas Court. Ct. App. Ohio, Warren County. Certiorari denied.

No. 85-1084. City of Independence, Ohio, et al. *v.* Tyler, Director of Environmental Protection of Ohio, et al. Ct. App. Ohio, Franklin County. Certiorari denied. Reported below: 25 Ohio App. 3d 20, 495 N. E. 2d 444.

No. 85-1095. Aamodt et ux. *v.* United States Nuclear Regulatory Commission et al. C. A. 3d Cir. Certiorari denied. Reported below: 771 F. 2d 720.

No. 85-1096. Van Sant *v.* United States Postal Service et al. C. A. 4th Cir. Certiorari denied.

No. 85-1117. Ashwood Manor Civic Assn. et al. *v.* Dole, Secretary of Transportation, et al. (two cases). C. A. 3d Cir. Certiorari denied. Reported below: 779 F. 2d 41.

No. 85-1166. Southwest Mortgage Service Corp. *v.* Pezzulli. C. A. 5th Cir. Certiorari denied. Reported below: 767 F. 2d 917.

No. 85-1169. Terre Du Lac, Inc., et al. *v.* Terre Du Lac Assn., Inc.; and
No. 85-1331. Terre Du Lac Assn., Inc. *v.* Terre Du Lac, Inc., et al. C. A. 8th Cir. Certiorari denied. Reported below: 772 F. 2d 467.

No. 85-1171. Bristow *v.* Daily Press, Inc. C. A. 4th Cir. Certiorari denied. Reported below: 770 F. 2d 1251.

No. 85-1181. Ennis *v.* New Jersey Bell Telephone Co. C. A. 3d Cir. Certiorari denied. Reported below: 782 F. 2d 396.

No. 85-1184. Brooklyn Union Gas Co. *v.* New York State Board of Equalization and Assessment et al. Ct. App. N. Y. Certiorari denied. Reported below: 65 N. Y. 2d 472, 482 N. E. 2d 77.

No. 85-1188. ROSE *v.* SUPREME COURT OF COLORADO. Sup. Ct. Colo. Certiorari denied.

No. 85-1189. LONG-AIRDOX CO., DIVISION OF THE MARMON GROUP, INC. *v.* KESSLER ET AL. Cir. Ct. W. Va., Fayette County. Certiorari denied.

No. 85-1198. GROM *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 21 M. J. 53.

No. 85-1227. BRIEHLER *v.* SYLVIA'S, INC., ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 774 F. 2d 1149.

No. 85-1228. BENTON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 479 So. 2d 83.

No. 85-1230. DANIEL B. ET AL. *v.* WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 776 F. 2d 1051.

No. 85-1238. HOLMES *v.* DISTRICT OF COLUMBIA DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS. Ct. App. D. C. Certiorari denied.

No. 85-1240. DANIEL A. TORRES, M. D., P. C., ET AL. *v.* EASTLICK, TRUSTEE OF NORTH AMERICAN COIN & CURRENCY, LTD. C. A. 9th Cir. Certiorari denied. Reported below: 767 F. 2d 1573.

No. 85-1243. NOVICKY *v.* SYNTEX OPHTHALMICS, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 767 F. 2d 901.

No. 85-1245. GAF CORP. *v.* WERNER. Ct. App. N. Y. Certiorari denied. Reported below: 66 N. Y. 2d 97, 485 N. E. 2d 977.

No. 85-1247. CHMELICKY *v.* MUCHEWICZ. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 85-1248. MALONE *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 85-1249. MCCOLLUM *v.* REID. Ct. App. N. Y. Certiorari denied. Reported below: 66 N. Y. 2d 151, 485 N. E. 2d 1010.

No. 85-1255. GOSLIN *v.* MCDERMOTT, INC. C. A. 5th Cir. Certiorari denied. Reported below: 776 F. 2d 1046.

No. 85–1260. LOWE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 230 Va. 346, 337 S. E. 2d 273.

No. 85–1263. NEW YORK STATE DEPARTMENT OF TRANSPORTATION *v.* SIERRA CLUB ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 776 F. 2d 383.

No. 85–1264. LAVANT *v.* ST. JOSEPH'S HOSPITAL ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 255 Ga. 60, 335 S. E. 2d 127.

No. 85–1270. KIENAST *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 912.

No. 85–1272. MYER *v.* PACIFIC FEDERAL SAVINGS & LOAN ASSN. App. Dept., Super. Ct. Cal., County of Orange. Certiorari denied.

No. 85–1273. EAGLE *v.* AMERICAN TELEPHONE & TELEGRAPH CO. C. A. 9th Cir. Certiorari denied. Reported below: 769 F. 2d 541.

No. 85–1274. ERNEST *v.* UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF VIRGINIA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 768 F. 2d 596.

No. 85–1276. RAMOS *v.* YIP ET AL. C. A. 9th Cir. Certiorari denied.

No. 85–1286. MESSING *v.* SIMON. Super. Ct. N. J., App. Div. Certiorari denied.

No. 85–1290. GLICKSTEIN *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 348 Pa. Super. 631, 501 A. 2d 291.

No. 85–1293. EDUCATIONAL SERVICES, INC., DBA INTERNATIONAL MONTESSORI SOCIETY, ET AL. *v.* MARYLAND STATE BOARD FOR HIGHER EDUCATION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 799 F. 2d 751.

No. 85–1294. LEBER ET AL. *v.* SMITH ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 773 F. 2d 101.

No. 85–1297. MANEGO *v.* ORLEANS BOARD OF TRADE ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 773 F. 2d 1.

No. 85–1298. PAYNE ET AL. *v.* WOOD. C. A. 7th Cir. Certiorari denied. Reported below: 775 F. 2d 202.

No. 85–1299. LAURENT ET AL. *v.* WATTS. C. A. 7th Cir. Certiorari denied. Reported below: 774 F. 2d 168.

No. 85–1302. SPIEGEL *v.* CONTINENTAL ILLINOIS NATIONAL BANK ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 132 Ill. App. 3d 1158, 494 N. E. 2d 957.

No. 85–1303. KOWALSKI *v.* KOWALSKI ET AL. Sup. Ct. Minn. Certiorari denied.

No. 85–1306. GONZALEZ *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 114 App. Div. 2d 469, 494 N. Y. S. 2d 379.

No. 85–1308. GERACE ET AL. *v.* NEW JERSEY CASINO CONTROL COMMISSION ET AL. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 203 N. J. Super. 297, 496 A. 2d 1111.

No. 85–1310. DUPONT *v.* SOUTHERN NATIONAL BANK OF HOUSTON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 771 F. 2d 874.

No. 85–1312. UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION LOCAL 1357 *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 780 F. 2d 1016.

No. 85–1313. JERSEY COAST EGG PRODUCERS, INC. *v.* LOCAL 863, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 773 F. 2d 530.

No. 85–1350. EDGEMON *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 85–1366. HUCKABY *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 776 F. 2d 564.

No. 85–1367. FRANK E. BUSH, INC. *v.* UNITED STATES POSTAL SERVICE. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 38.

No. 85-1375. BAWCUM *v.* MARSH, SECRETARY OF THE ARMY. C. A. 9th Cir. Certiorari denied. Reported below: 779 F. 2d 56.

No. 85-1390. ARMSTRONG ET AL. *v.* THOMAS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 774 F. 2d 1163.

No. 85-1398. ALEMANY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 781 F. 2d 229.

No. 85-1416. ARUBA BONAIRE CURACAO TRUST CO. LTD., TRUSTEE OF THE SUPRIANO TRUST, ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. D. C. Cir. Certiorari denied. Reported below: 250 U. S. App. D. C. 38, 777 F. 2d 38.

No. 85-5213. LODOWSKI *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 302 Md. 691, 490 A. 2d 1228.

No. 85-5214. ELFADL *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 61 Md. App. 132, 485 A. 2d 275.

No. 85-5938. GONZALES *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 85-6051. COLE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 499 A. 2d 815.

No. 85-6073. WENTZ *v.* DEPARTMENT OF JUSTICE. C. A. 7th Cir. Certiorari denied. Reported below: 772 F. 2d 335.

No. 85-6082. ELLIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 770 F. 2d 1082.

No. 85-6091. WILEY *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 85-6092. ROGERS *v.* SUPREME COURT OF VIRGINIA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 772 F. 2d 900.

No. 85-6095. CLIPP *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 782 F. 2d 1032.

No. 85-6100. KALYON *v.* NEW YORK. Sup. Ct. N. Y., Kings County. Certiorari denied.

No. 85–6219. Johnson *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 85–6223. Bongiovi *v.* LeFevre, Superintendent, Clinton Correctional Facility. C. A. 2d Cir. Certiorari denied.

No. 85–6224. Drinkwine *v.* Federated Publications, Inc., et al. C. A. 9th Cir. Certiorari denied. Reported below: 780 F. 2d 735.

No. 85–6250. Diamontiney *v.* California. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 85–6257. Delgado *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 780 F. 2d 1028.

No. 85–6260. Lynch *v.* Johnson et al. C. A. 3d Cir. Certiorari denied. Reported below: 782 F. 2d 1029.

No. 85–6266. Green *v.* Superior Court of California, Alameda County. Sup. Ct. Cal. Certiorari denied. Reported below: 40 Cal. 3d 126, 707 P. 2d 248.

No. 85–6281. Rosberg *v.* Commodity Credit Corp. et al. C. A. 8th Cir. Certiorari denied.

No. 85–6282. Rosberg *v.* Goeres. C. A. 8th Cir. Certiorari denied.

No. 85–6284. Nelson *v.* Veterans Administration. C. A. Fed. Cir. Certiorari denied. Reported below: 785 F. 2d 326.

No. 85–6285. Wilbanks *v.* Georgia. Ct. App. Ga. Certiorari denied. Reported below: 176 Ga. App. 533, 336 S. E. 2d 312.

No. 85–6286. Wallace *v.* Iowa. Dist. Ct. Iowa, Scott County. Certiorari denied.

No. 85–6288. Filipas *v.* Lemons et al. C. A. 6th Cir. Certiorari denied. Reported below: 767 F. 2d 920.

No. 85–6289. Armstrong *v.* Fairman, Warden, et al. C. A. 7th Cir. Certiorari denied.

No. 85–6290. Washington *v.* New York. Ct. App. N. Y. Certiorari denied. Reported below: 66 N. Y. 2d 923, 489 N. E. 2d 783.

No. 85-6291. KOENIG *v.* BOARD OF CHARITIES AND CORRECTIONS ET AL. C. A. 8th Cir. Certiorari denied.

No. 85-6293. MCDONALD *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 85-6296. CLUTCHETTE *v.* RUSHEN, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 2d 1469.

No. 85-6297. KUNTZELMAN *v.* BLACK, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 774 F. 2d 291.

No. 85-6301. COATES *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 109 Ill. 2d 431, 488 N. E. 2d 247.

No. 85-6302. BEAUDETT *v.* CITY OF HAMPTON, VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 775 F. 2d 1274.

No. 85-6303. LAMAR *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 134 Ill. App. 3d 1155, 496 N. E. 2d 366.

No. 85-6305. HAMM *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 136 Ill. App. 3d 11, 482 N. E. 2d 1103.

No. 85-6306. JACKSON *v.* RUSSELL, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 770 F. 2d 1082.

No. 85-6310. GREGORY *v.* SOLEM, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 774 F. 2d 309.

No. 85-6311. HOUGHTON *v.* CODER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 911.

No. 85-6312. FULFORD *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 85-6313. ADAMS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 109 Ill. 2d 102, 485 N. E. 2d 339.

No. 85-6316. ROSBERG *v.* COMMERCIAL STATE BANK ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 774 F. 2d 1171.

No. 85-6317. RODRIGUEZ *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 134 Ill. App. 3d 582, 480 N. E. 2d 1147.

No. 85-6319. STEVENSON *v.* NEWSOME, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 774 F. 2d 1558.

No. 85-6323. OSIPOVA *v.* WOLIN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 795 F. 2d 79.

No. 85-6326. HOSKINS *v.* GARLAND, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 782 F. 2d 1035.

No. 85-6332. AGUILAR *v.* ONION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 778 F. 2d 789.

No. 85-6334. KLEIN *v.* CIBA GEIGY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 912.

No. 85-6377. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 775 F. 2d 1295.

No. 85-6411. TELEPO *v.* CAMPEAN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 782 F. 2d 1031.

No. 85-587. TEXAS *v.* DUNN. Ct. Crim. App. Tex. Certiorari denied. JUSTICE WHITE, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE REHNQUIST would grant the petition for writ of certiorari, vacate the judgment, and remand the case for further consideration in light of *Moran* v. *Burbine*, *ante*, p. 412. Reported below: 696 S. W. 2d 561.

No. 85-969. GRAY ET AL. *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. D. C. Cir. Certiorari denied. Reported below: 248 U. S. App. D. C. 364, 771 F. 2d 1504.

JUSTICE WHITE, dissenting.

In this case the United States Court of Appeals for the District of Columbia Circuit held that the comprehensive remedial scheme established by Congress in the Civil Service Reform Act of 1978[1] (CSRA) indicates a congressional intent to preclude judicial review under the Administrative Procedure Act[2] of claims that could have been reviewed administratively under the CSRA. 248

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[1] Pub. L. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U. S. C.).

[2] 5 U. S. C. § 701 *et seq.*

U. S. App. D. C. 364, 771 F. 2d 1504 (1985). While eight other Courts of Appeals have reached a similar conclusion, the United States Court of Appeals for the First Circuit has held to the contrary. *Dugan* v. *Ramsay*, 727 F. 2d 192 (1984). I would grant certiorari to resolve this conflict.

No. 85–1018. SOUTHLAND NEWS CO., INC. *v.* COUNTY OF WINNEBAGO ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 774 F. 2d 1167.

No. 85–1201. FORD MOTOR CO. *v.* WALSH ET AL. C. A. D. C. Cir. Motion of petitioner to defer consideration of the petition for writ of certiorari denied. Certiorari denied.

No. 85–1282. IRVING EAR, NOSE, THROAT & ALLERGY CLINIC ET AL. *v.* GROUP HOSPITAL SERVICE, INC., ET AL. C. A. 5th Cir. Motion of respondents for award of damages pursuant to Rule 49.2 denied. Certiorari denied. Reported below: 776 F. 2d 1046.

No. 85–5375. BLANKS *v.* GEORGIA. Sup. Ct. Ga.;

No. 85–6145. GUZMON *v.* TEXAS. Ct. Crim. App. Tex.;

No. 85–6229. COLLINS *v.* GEORGIA. Super. Ct. Ga., Houston County;

No. 85–6259. CURRY *v.* GEORGIA. Sup. Ct. Ga.;

No. 85–6268. ROMAN *v.* FLORIDA. Sup. Ct. Fla.;

No. 85–6270. LANEY *v.* TENNESSEE. Ct. Crim. App. Tenn.; and

No. 85–6275. JONES *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: No. 85–5375, 254 Ga. 420, 330 S. E. 2d 575; No. 85–6145, 697 S. W. 2d 404; No. 85–6259, 255 Ga. 215, 336 S. E. 2d 762; No. 85–6268, 475 So. 2d 1228; No. 85–6275, 109 Ill. 2d 19, 485 N. E. 2d 363.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 84–801. MIDLANTIC NATIONAL BANK *v.* NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, 474 U. S. 494. Petition for rehearing denied.

No. 84–805. O'Neill, Trustee in Bankruptcy of Quanta Resources Corp., Debtor *v.* City of New York et al.; and O'Neill, Trustee in Bankruptcy of Quanta Resources Corp., Debtor *v.* New Jersey Department of Environmental Protection, 474 U. S. 494;

No. 85–529. Hou Hawaiians *v.* Hawaii et al., 474 U. S. 1055;

No. 85–604. Scarnati *v.* United States, 474 U. S. 1056;

No. 85–826. Golin *v.* Brookhaven National Laboratory, 474 U. S. 1059;

No. 85–896. Johnson *v.* Linden Shore District, 474 U. S. 1102;

No. 85–945. Oglala Sioux Tribe of the Pine Ridge Indian Reservation *v.* South Dakota et al., 474 U. S. 1102;

No. 85–952. Grason Electric Co. et al. *v.* Sacramento Municipal Utility District, 474 U. S. 1103;

No. 85–5786. Davis *v.* First State Bank, 474 U. S. 1098;

No. 85–5866. In re Griffin, 474 U. S. 1100;

No. 85–5875. In re May, 474 U. S. 1100;

No. 85–5878. In re May, 474 U. S. 1100;

No. 85–5896. Rubin *v.* Board of Governors of State Colleges and Universities (Western Illinois University), 474 U. S. 1104;

No. 85–5959. Wham *v.* United States et al., 474 U. S. 1105; and

No. 85–5963. Calver *v.* Owners of Ridgecrest Mobile Home Park et al., 474 U. S. 1105. Petitions for rehearing denied.

No. 84–1070. Witters *v.* Washington Department of Services for the Blind, 474 U. S. 481. Petition for rehearing or modification of opinion denied.

No. 84–1076. Transcontinental Gas Pipe Line Corp. *v.* State Oil and Gas Board of Mississippi et al., 474 U. S. 409. Motion of Louisiana for leave to file a brief as *amicus curiae* in support of petitions for rehearing denied. Petitions of State Oil and Gas Board of Mississippi, Coastal Exploration, Inc., and Getty Oil Co. for rehearing denied.

No. 85–137. Lavado *v.* United States, 474 U. S. 1054. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

MARCH 25, 1986

Miscellaneous Order

No. A–653 (85–6448). ADAMS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. The order heretofore entered March 6, 1986 [*ante*, p. 1062], staying execution of the sentence of death is continued to and including Monday, March 31, 1986.

MARCH 28, 1986

Dismissal Under Rule 53

No. 85–1195. LONAVAT *v.* HARVEY ET AL. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 779 F. 2d 35.

MARCH 31, 1986

Appeal Dismissed

No. 85–1261. MEYERS ET AL. *v.* SENECA COUNTY BOARD OF COMMISSIONERS. Appeal from Sup. Ct. Ohio dismissed for want of substantial federal question. Reported below: 20 Ohio St. 3d 13, 484 N. E. 2d 699.

Miscellaneous Orders

No. A–581 (85–1459). POWELL *v.* POWELL. Ct. App. Tex., 10th Sup. Jud. Dist. Application for recall and stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A–703. FEDORA *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Application for stay pending appeal, addressed to JUSTICE POWELL and referred to the Court, denied.

No. D–536. IN RE DISBARMENT OF LOVETT. Disbarment entered. [For earlier order herein, see 474 U. S. 1079.]

No. D–538. IN RE DISBARMENT OF VETTER. Disbarment entered. [For earlier order herein, see 474 U. S. 1044.]

No. D–539. IN RE DISBARMENT OF MUELLER. Disbarment entered. [For earlier order herein, see 474 U. S. 1044.]

No. D–540. IN RE DISBARMENT OF CHOSID. Disbarment entered. [For earlier order herein, see 474 U. S. 1044.]

No. D–550. IN RE DISBARMENT OF MICHAELS. It is ordered that Robert Scott Michaels, of Beverly Hills, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–551. In re Disbarment of Nichols. It is ordered that Zane Gray Nichols, of Annapolis, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 103, Orig. South Dakota *v.* Nebraska et al. Motion of North Dakota for leave to intervene as plaintiff granted. Motion for leave to file bill of complaint denied without prejudice. [For earlier order herein, see 474 U. S. 941.]

No. 84–1379. Diamond et al. *v.* Charles et al. C. A. 7th Cir. [Probable jurisdiction noted, 471 U. S. 1115.] Motion of appellants for leave to file a supplemental brief after argument granted.

No. 84–1777. International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, et al. *v.* Brock, Secretary of Labor. C. A. D. C. Cir. [Certiorari granted, 474 U. S. 900.] Motion of Chamber of Commerce of the United States et al. for leave to file a brief as *amici curiae* out of time granted.

No. 85–473. Cargill, Inc., et al. *v.* Monfort of Colorado, Inc. C. A. 10th Cir. [Certiorari granted, 474 U. S. 1049.] Motion of the parties to permit filing one volume of joint appendix under seal granted. Justice Blackmun took no part in the consideration or decision of this motion.

No. 85–521. Bowen, Secretary of Health and Human Services, et al. *v.* Public Agencies Opposed to Social Security Entrapment et al. D. C. E. D. Cal. [Probable jurisdiction noted *sub nom. Heckler* v. *Public Agencies Opposed to Social Security Entrapment,* 474 U. S. 1004.] Motion of appellees Public Agencies Opposed to Social Security Entrapment et al. for leave to file an out-of-time motion for divided argument denied.

No. 85–599. United States *v.* American Bar Endowment et al. C. A. Fed. Cir. [Certiorari granted, 474 U. S. 1004.]

Motion of California Farm Bureau Federation for leave to file a brief as *amicus curiae* granted. JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of this motion.

No. 85–1377. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES *v.* SYNAR, MEMBER OF CONGRESS, ET AL.;

No. 85–1378. UNITED STATES SENATE *v.* SYNAR, MEMBER OF CONGRESS, ET AL.; and

No. 85–1379. O'NEILL, SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL. *v.* SYNAR, MEMBER OF CONGRESS, ET AL. D. C. D. C. [Probable jurisdiction noted, *ante*, p. 1009.] Motion of National Treasury Employees Union for leave to add an individual party plaintiff granted.

No. 85–6368. IN RE KIERSTEAD. Petition for writ of common-law certiorari denied.

No. 85–6371. IN RE KARRIEM ET AL. Petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Postponed

No. 85–1200. CALIFORNIA COASTAL COMMISSION ET AL. *v.* GRANITE ROCK CO. Appeal from C. A. 9th Cir. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 768 F. 2d 1077.

Certiorari Granted

No. 85–1265. MICHIGAN *v.* SHABAZ. Sup. Ct. Mich. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 424 Mich. 42, 378 N. W. 2d 451.

Certiorari Denied. (See also No. 85–6368, *supra.*)

No. 85–862. HUSTLER MAGAZINE, INC. *v.* DOUGLASS. C. A. 7th Cir. Certiorari denied. Reported below: 769 F. 2d 1128.

No. 85–970. THOMPSON *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 21 M. J. 94.

No. 85–1141. BOARD OF TRUSTEES OF INTERNAL IMPROVEMENT TRUST FUND OF FLORIDA *v.* SAND KEY ASSOCIATES, LTD. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 489 So. 2d 34.

No. 85–1142. MANUFACTURERS HANOVER TRUST CO., AS EXECUTOR OF THE ESTATE OF WALLACE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 775 F. 2d 459.

No. 85–1158. CRAWFORD ET AL. *v.* UNITED STEELWORKERS, AFL–CIO, ET AL. Sup. Ct. Va. Certiorari denied. Reported below: 230 Va. 217, 335 S. E. 2d 828.

No. 85–1187. DISALVO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 779 F. 2d 1191.

No. 85–1322. LIGHTMAN ET AL. *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 339 Pa. Super. 359, 489 A. 2d 200.

No. 85–1323. KING *v.* UNIVERSITY OF MINNESOTA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 774 F. 2d 224.

No. 85–1325. GREEN *v.* OWENS-ILLINOIS CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 779 F. 2d 50.

No. 85–1326. ANDING *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 135 Ill. App. 3d 1168, 496 N. E. 2d 1278.

No. 85–1327. HARDAWAY CONSTRUCTORS, INC. *v.* BROWNING. Ct. App. Ga. Certiorari denied. Reported below: 176 Ga. App. 530, 336 S. E. 2d 579.

No. 85–1332. CAVALIERI *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 345 Pa. Super. 615, 496 A. 2d 849.

No. 85–1338. WYAND ET AL. *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 304 Md. 721, 501 A. 2d 43.

No. 85–1340. MARCUM *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 85–1342. CHICAGO PARK DISTRICT ET AL. *v.* ALEXANDER ET AL.; and

No. 85–1356. ALEXANDER ET AL. *v.* CHICAGO PARK DISTRICT ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 773 F. 2d 850.

No. 85-1348. HAMM *v.* DEKALB COUNTY, GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 774 F. 2d 1567.

No. 85-1355. FLEMING ET AL. *v.* ALLSTATE INSURANCE CO. Ct. App. N. Y. Certiorari denied. Reported below: 66 N. Y. 2d 838, 489 N. E. 2d 252.

No. 85-1365. CALIFORNIA *v.* SERNA. Sup. Ct. Cal. Certiorari denied. Reported below: 40 Cal. 3d 239, 707 P. 2d 793.

No. 85-1436. ACOSTA ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 770 F. 2d 1082.

No. 85-1455. PRADO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 777 F. 2d 248.

No. 85-1456. GADD *v.* NEWS-PRESS PUBLISHING CO. ET AL. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 480 So. 2d 1302.

No. 85-5699. WILSON *v.* SCHILLINGER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 761 F. 2d 921 and 768 F. 2d 554.

No. 85-5821. WADE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 767 F. 2d 916.

No. 85-5917. EDWARDS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 772 F. 2d 917.

No. 85-6005. FAIR *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 197 Conn. 106, 496 A. 2d 461.

No. 85-6122. KIDDA *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR. C. A. 3d Cir. Certiorari denied. Reported below: 769 F. 2d 165.

No. 85-6128. MCCOY *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 2d 170.

No. 85-6280. ABDULLAH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 782 F. 2d 1049.

No. 85–6321. Henton *v.* Job Services. C. A. 8th Cir. Certiorari denied.

No. 85–6322. Murray *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 782 F. 2d 1054.

No. 85–6327. Widemon *v.* R. J. Reynolds Tobacco Co. et al. C. A. 4th Cir. Certiorari denied. Reported below: 782 F. 2d 1037.

No. 85–6338. Kumar *v.* Board of Trustees of the University of Massachusetts. C. A. 1st Cir. Certiorari denied. Reported below: 774 F. 2d 1.

No. 85–6340. Matusavage *v.* Merit Systems Protection Board. C. A. Fed. Cir. Certiorari denied. Reported below: 785 F. 2d 321.

No. 85–6341. Shehee *v.* Kemp, Superintendent, Georgia Diagnostic and Classification Center, et al. C. A. 11th Cir. Certiorari denied.

No. 85–6344. MacGuire *v.* Board of Governors for the Florida Bar et al. C. A. 11th Cir. Certiorari denied.

No. 85–6345. Tucker *v.* Anderson et al. C. A. 11th Cir. Certiorari denied.

No. 85–6351. Galvan *v.* Minnesota. Sup. Ct. Minn. Certiorari denied. Reported below: 374 N. W. 2d 269.

No. 85–6354. Bond *v.* New York. Ct. App. N. Y. Certiorari denied. Reported below: 66 N. Y. 2d 1037, 489 N. E. 2d 1306.

No. 85–6359. Denby *v.* Connecticut. Sup. Ct. Conn. Certiorari denied. Reported below: 198 Conn. 23, 501 A. 2d 1206.

No. 85–6367. Choat *v.* Rome Industries, Inc., et al. C. A. Fed. Cir. Certiorari denied. Reported below: 776 F. 2d 1064.

No. 85–6380. Ortiz *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 776 F. 2d 864.

No. 85-6384. MERRIWEATHER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 777 F. 2d 503.

No. 85-6387. CLARK ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 779 F. 2d 47.

No. 85-6414. HOPKINS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 230 Va. 280, 337 S. E. 2d 264.

No. 85-6415. SCHELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 775 F. 2d 559.

No. 85-6429. RORIE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 781 F. 2d 903.

No. 85-6438. SCARBOROUGH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 772 F. 2d 719 and 779 F. 2d 618.

No. 85-6454. MASSUH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 780 F. 2d 534.

No. 85-6457. CALLANAN ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 777 F. 2d 1105.

No. 85-6460. PURCELL ET UX. *v.* BOARD OF IMMIGRATION APPEALS. C. A. 8th Cir. Certiorari denied. Reported below: 782 F. 2d 1048.

No. 85-6468. COX ET AL. *v.* DUCKWORTH, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 776 F. 2d 1051.

No. 84-6778. DAVIS *v.* OKLAHOMA. Ct. Crim. App. Okla.;
No. 85-5053. DOUGAN *v.* FLORIDA. Sup. Ct. Fla.;
No. 85-5553. KENLEY *v.* MISSOURI. Sup. Ct. Mo.;
No. 85-5651. LOWERY *v.* INDIANA. Sup. Ct. Ind.;
No. 85-5833. NAVE *v.* MISSOURI. Sup. Ct. Mo.;
No. 85-6168. BILLIOT *v.* MISSISSIPPI. Sup. Ct. Miss.;
No. 85-6228. HOOPER *v.* FLORIDA. Sup. Ct. Fla.;
No. 85-6342. WILCHER *v.* MISSISSIPPI. Sup. Ct. Miss.; and
No. 85-6382. WOOMER *v.* AIKEN, WARDEN. Sup. Ct. S. C.
Certiorari denied. Reported below: No. 85-5053, 470 So. 2d 697; No. 85-5553, 693 S. W. 2d 79; No. 85-5651, 478 N. E. 2d

1214; No. 85-5833, 694 S. W. 2d 729; No. 85-6168, 478 So. 2d 1043; No. 85-6228, 476 So. 2d 1253; No. 85-6342, 479 So. 2d 710.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 85-1. OHIO *v.* ADKINS. Ct. App. Ohio, Highland County. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 85-393. OHIO *v.* COUNTS. Ct. App. Ohio, Pickaway County. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 85-1305. BUNNELL, SUPERINTENDENT, CALIFORNIA CORRECTIONAL INSTITUTION *v.* ARMANT. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 772 F. 2d 552.

No. 85-1346. COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO *v.* ALLIED CHEMICAL INTERNATIONAL CORP. C. A. 2d Cir. Motion of Inter-American Freight Conference, Sections A and D, for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 775 F. 2d 476.

No. 85-6264. STRAIGHT *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. JUSTICE BLACKMUN dissents. Reported below: 772 F. 2d 674.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 85-6324. WATKINS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 229 Va. 469, 331 S. E. 2d 422.

Opinion of JUSTICE STEVENS respecting the denial of the petition for certiorari.

As JUSTICE MARSHALL explains in his dissenting opinion, the violation of petitioner's Fifth Amendment right to counsel requires that the sentence of death for the shooting of Betty Jean Barker be set aside. However, in view of the fact that, as petitioner has presented the issue, this error would not appear to have affected the validity of the conviction or the death sentence for the murder of Carl Douglas Buchanan, I agree with the Court's decision to deny certiorari and allow the error to be corrected in collateral proceedings.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

In the landmark case of *Miranda* v. *Arizona*, 384 U. S. 436 (1966), this Court held that before police institute custodial interrogation of an individual, they must inform him of his right to consult with counsel. *Miranda* further required that the police respect the individual's decision to exercise that right. We stated, in clear and mandatory language:

> "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent." *Id.*, at 474.

We reaffirmed that rule in *Fare* v. *Michael C.*, 442 U. S. 707, 719 (1979) ("[T]he Court fashioned in *Miranda* the rigid rule that an accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease"); see also *Rhode Island* v. *Innis*, 446 U. S. 291, 298 (1980); *Michigan* v. *Mosley*, 423 U. S. 96, 104, n. 10 (1975); *id.*, at 109–111 (WHITE, J., concurring in result). We refined the rule in *Edwards* v. *Arizona*, 451 U. S. 477, 485 (1981), explaining that the right to counsel, once asserted, cannot be waived "unless the accused himself initiates further communication, exchanges, or conversations with the police." We emphasized: "[I]t is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." *Ibid.*

In this case, the Court acquiesces in a blatant denial of that Fifth Amendment right by the police and the courts of the State of Virginia. Unwilling to ignore that violation, I dissent from the denial of certiorari.

I

Petitioner Johnny Watkins, Jr. was charged with the murder of Betty Jean Barker. The State announced its intention to introduce at the penalty phase of that trial a statement made by Watkins in connection with an unrelated murder. During the pretrial suppression hearing, the following facts emerged.

Watkins was arrested in the evening of November 22, 1983, as a suspect in the murder of Carl Douglas Buchanan. He was questioned about 11 p.m. and signed a waiver-of-rights form, but then told the interrogating officer that he wanted to see a lawyer. Interrogation ceased temporarily.

About two hours later, Watkins was informed that he was being charged with the murder of Buchanan. He asked why he was being charged, and was given a second waiver-of-rights form to execute. The police then told Watkins that his brother Darnell had implicated him in the murder, played for him a portion of Darnell's recorded statement, and took him to see Darnell. Watkins refused to talk to police about the shooting.

The police did not supply Watkins with a lawyer. They instead transferred him to the county jail, held him there until November 28, and then reinterrogated him. Testimony was conflicting as to what happened at the November 28 meeting. The parties agreed that a police officer went to the jail to interrogate Watkins, and had him sign a waiver-of-rights form. Watkins testified that he again asked for a lawyer but that the officer ignored his request, and that the officer "nagg[ed]" him until he admitted to the shooting of Buchanan. The officer testified that Watkins never stated on November 28 that he wanted to stop the questioning or consult with a lawyer, and that he gave his statement without apparent hesitation. The Barker trial court apparently credited the officer's testimony. There was no dispute, however, that Watkins had requested a lawyer five days earlier, had not received one, had not himself reinitiated questioning, and had been questioned again nonetheless.

Watkins' statement implicating himself in the Buchanan killing, along with extensive other evidence of that crime, was admitted over objection in the penalty phase of Watkins' trial for the shooting of Barker. The jury sentenced Watkins to death. Some months later, Watkins was convicted of the murder of Buchanan, and was given a second death sentence.

The facts of this case constitute a plain violation of petitioner's Fifth Amendment right to counsel. Our law sets out a bright-line rule that all questioning must cease after an accused requests counsel, so that repeated police questioning does not "wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." *Smith* v. *Illinois*, 469 U. S. 91, 98 (1984) *(per curiam)*. The accused may not be found to have waived that right, once he asserts it, unless he himself reinitiates questioning. *Ibid.*

In this case, Watkins made an undisputed and unequivocal request for counsel on November 22, and refused to talk to the authorities in counsel's absence. The response of the police was to hold Watkins without a lawyer for five days and then to interrogate him again. Even if the trial court credited the police officer with respect to the events of November 28, that interrogation was impermissible under *Miranda* and its progeny, and any statement so elicited should not have been admitted in the penalty phase of a capital proceeding. See *Estelle* v. *Smith*, 451 U. S. 454, 462–463 (1981); see also *Del Vecchio* v. *Illinois*, 474 U. S. 883 (1985) (MARSHALL, J., dissenting from denial of certiorari).

II

Respondent State of Virginia contends that petitioner did not adequately present his Fifth Amendment claim to the Supreme Court of Virginia. It focuses on the fact that Watkins did not include the magic words "*Edwards* v. *Arizona*" in his brief to that court. This contention has no merit. *Edwards* merely set out an elaboration of the basic rule of *Miranda*, and Watkins cited expressly to *Miranda* below. He argued to the trial court that the statement had been taken in violation of his Fifth Amendment right to counsel. He argued to the appellate court that his statement had been taken in violation of his Fifth Amendment rights and was involuntary, focusing on his claim that police had ignored an express request for counsel on November 28. While Watkins did not present his argument below as proficiently as he now does in his petition for certiorari, he unmistakably raised below and reasserts here a claim that the November 28 statement was taken in violation of his Fifth Amendment right to counsel. The denial of his November 22 request for counsel is part and parcel of that claim. See *Eddings* v. *Oklahoma*, 455 U. S. 104, 113–114, n. 9 (1982).

III

The Court today allows Watkins' death sentence to stand notwithstanding the illegality of the evidence introduced before the jury in its sentencing deliberations. The denial of his petition adds to a long line of cases in which the Court has declined to review capital sentences marred by the sort of violation described here. *E. g., Henderson* v. *Florida*, 473 U. S. 916 (1985) (MARSHALL, J., dissenting from denial of certiorari); *James* v. *Arizona*, 469 U. S. 990 (1984) (BRENNAN, J., dissenting from denial of certiorari); *Johnson* v. *Virginia*, 454 U. S. 920 (1981) (MARSHALL, J., dissenting from denial of certiorari). I dissent.

No. 85–6448 (A–653). ADAMS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, denied. Stay of execution heretofore granted [*ante*, pp. 1062 and 1092] is vacated. Certiorari denied. Reported below: 484 So. 2d 1211.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay and the petition for writ of certiorari and would vacate the death sentence in this case.

No. 85–6470 (A–663). ADAMS *v.* FLORIDA. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, denied. Certiorari denied. Reported below: 484 So. 2d 1216.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay and the petition for writ of certiorari and would vacate the death sentence in this case.

No. 85–6476 (A–664). ADAMS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, denied. Certiorari denied. Reported below: 484 So. 2d 580.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay and the petition for writ of certiorari and would vacate the death sentence in this case.

Rehearing Denied

No. 84–744. UNITED STATES *v.* LANE ET AL., 474 U. S. 438;

No. 85–1179. SONDEREGGER *v.* E. F. HUTTON & CO., INC., ET AL., *ante*, p. 1048;

No. 85–5865. HOWARD *v.* UNITED STATES, *ante*, p. 1022;

No. 85–5893. NICKENS *v.* MISSISSIPPI, 474 U. S. 1104;

No. 85–5931. DYSON *v.* TEXAS, *ante*, p. 1002; and

No. 85–6078. MUZA *v.* UNITED STATES, *ante*, p. 1028. Petitions for rehearing denied.

APRIL 7, 1986

Appeals Dismissed

No. 85–1418. NATIONWIDE MUTUAL INSURANCE CO. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN BERNARDINO (MITCHELL ET AL., REAL PARTIES IN INTEREST). Appeal from Ct. App. Cal., 4th App. Dist., dismissed for want of jurisdiction.

No. 85–1452. LAUVE *v.* SECRETARY OF STATE OF MICHIGAN; LAUVE *v.* ATTORNEY GENERAL OF MICHIGAN; and LAUVE *v.* SECRETARY OF STATE OF MICHIGAN. Appeals from Sup. Ct. Mich. dismissed for want of jurisdiction. Treating the papers whereon the appeals were taken as a petition for writ of certiorari, certiorari denied. Reported below: 422 Mich. 964 (first case); 424 Mich. 855 (second case); 425 Mich. 874 (third case).

No. 85–6451. WESLEY *v.* TEXAS. Appeal from 66th Jud. Dist. Ct. Tex., Hill County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded

No. 84–6677. HOLLOWAY *v.* TEXAS. Ct. Crim. App. Tex. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Michigan* v. *Jackson*, *ante*, p. 625, and *Moran* v. *Burbine*, *ante*, p. 412. Reported below: 691 S. W. 2d 608.

No. 85–249. CITY OF LITTLE ROCK *v.* WILLIAMS. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pembaur* v. *Cincinnati*, *ante*, p. 469. Reported below: 762 F. 2d 73.

No. 85–487. FORD MOTOR CO. ET AL. *v.* TUNIS BROTHERS CO., INC., ET AL. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, *ante*, p. 574. Reported below: 763 F. 2d 1482.

No. 85–6318. MACLEAN *v.* CITY OF BELLINGHAM. Ct. App. Wash. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Pembaur* v. *Cincinnati*, *ante*, p. 469. Reported below: 41 Wash. App. 700, 705 P. 2d 1232.

Certiorari Dismissed

No. 85–6557. JONES *v.* SMITH, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Petition for writ of certiorari dismissed as moot. Reported below: 786 F. 2d 1011.

Miscellaneous Orders

No. — ——. COOK *v.* CHIU-AN WANG ET AL. Motion to direct the Clerk to file a petition for writ of certiorari out of time denied.

No. A–710 (85–6545). JAMES *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Fla. The stay order granted March 18, 1986 [*ante*, p. 1074], is continued pending final disposition of the petition for writ of certiorari.

No. A–694. Bankers' Life & Casualty Co. *v.* Crenshaw. Sup. Ct. Miss. Application for stay pending appeal, addressed to The Chief Justice and referred to the Court, denied. Justice Blackmun and Justice Stevens would grant this application.

No. A–756. Johnson *v.* Texas. Application for stay of execution of sentence of death, presented to Justice White, and by him referred to the Court, is granted pending the filing of a petition for writ of certiorari on or before May 7, 1986. If the petition is filed on or before May 7, 1986, this order is to continue in effect pending this Court's final disposition of the petition for writ of certiorari.

No. D–533. In re Disbarment of Evans. Disbarment entered. [For earlier order herein, see 474 U. S. 1002.]

No. D–543. In re Disbarment of Deglow. Disbarment entered. [For earlier order herein, see 474 U. S. 1079.]

No. D–544. In re Disbarment of Tilley. Disbarment entered. [For earlier order herein, see *ante*, p. 1003.]

No. D–552. In re Disbarment of Plaza. It is ordered that Richard J. Plaza, of Jersey City, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 84–1379. Diamond et al. *v.* Charles et al. C. A. 7th Cir. [Probable jurisdiction noted, 471 U. S. 1115.] Motion of appellees for leave to file a supplemental brief after argument granted.

No. 85–250. Lyng, Secretary of Agriculture *v.* Castillo et al. D. C. S. D. Tex. [Probable jurisdiction noted *sub nom. Block* v. *Castillo*, 474 U. S. 994.] Motion of the Solicitor General to permit Jeffrey P. Minear, Esquire, to present oral argument *pro hac vice* granted.

No. 85–437. Arcara, District Attorney of Erie County *v.* Cloud Books, Inc., dba Village Book & News Store, et al. Ct. App. N. Y. [Certiorari granted, 474 U. S. 978.] Motion of City of Santa Ana for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral argument denied.

No. 85–473. CARGILL, INC., ET AL. *v.* MONFORT OF COLORADO, INC. C. A. 10th Cir. [Certiorari granted, 474 U. S. 1049.] Motion of The Business Roundtable for leave to file a brief as *amicus curiae* granted. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

No. 85–920. ALASKA AIRLINES, INC., ET AL. *v.* BROCK, SECRETARY OF LABOR, ET AL. C. A. D. C. Cir. [Certiorari granted, *ante,* p. 1044.] Motion of petitioners to dispense with printing the joint appendix granted.

No. 85–1377. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES *v.* SYNAR, MEMBER OF CONGRESS, ET AL.;

No. 85–1378. UNITED STATES SENATE *v.* SYNAR, MEMBER OF CONGRESS, ET AL.; and

No. 85–1379. O'NEILL, SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL. *v.* SYNAR, MEMBER OF CONGRESS, ET AL. D. C. D. C. [Probable jurisdiction noted, *ante,* p. 1009.] Motion of the parties for divided argument granted.

No. 85–6374. IN RE KOENIG. Petition for writ of mandamus denied.

Certiorari Granted

No. 85–1027. ARIZONA *v.* HICKS. Ct. App. Ariz. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 146 Ariz. 533, 707 P. 2d 331.

Certiorari Denied. (See also Nos. 85–1452 and 85–6451, *supra.*)

No. 84–6580. MARANT *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 84–6825. PFEIL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF PFEIL *v.* ROGERS, FORMER DISTRICT ATTORNEY OF RUSK COUNTY, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 757 F. 2d 850.

No. 85–82. BUILDING & CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY ET AL. *v.* ALTEMOSE CONSTRUCTION CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 751 F. 2d 653.

No. 85–301. AMEY, INC., ET AL. *v.* GULF ABSTRACT & TITLE, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 758 F. 2d 1486.

No. 85-885. ZELEZNIK, ADMINISTRATOR OF THE ESTATE OF ZELEZNIK, ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 20.

No. 85-890. HUBBY *v.* HISTORIC SAVANNAH FOUNDATION ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 770 F. 2d 174.

No. 85-1042. MARINE TRANSPORT LINES, INC. *v.* INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS. C. A. 11th Cir. Certiorari denied. Reported below: 770 F. 2d 1526.

No. 85-1058. LISIECKI *v.* FEDERAL HOME LOAN BANK BOARD ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 769 F. 2d 1558.

No. 85-1100. DOE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 774 F. 2d 624.

No. 85-1146. KWALLEK *v.* ALASKA. Ct. App. Alaska. Certiorari denied.

No. 85-1155. PAPAGO TRIBAL UTILITY AUTHORITY *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. 9th Cir. Certiorari denied. Reported below: 773 F. 2d 1056.

No. 85-1196. CITY OF CHARLOTTESVILLE, VIRGINIA *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 249 U. S. App. D. C. 236, 774 F. 2d 1205.

No. 85-1315. KOSHER ET UX. *v.* STAMATIS ET UX. Ct. App. N. Y. Certiorari denied. Reported below: 66 N. Y. 2d 223, 487 N. E. 2d 241.

No. 85-1320. CENTRAL HARDWARE CO. *v.* CENTRAL STATES, SOUTHEAST & SOUTHWEST AREAS PENSION FUND ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 770 F. 2d 106.

No. 85-1334. ROE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 781 F. 2d 238.

No. 85-1351. CASACELI, INDIVIDUALLY AND AS DULY AUTHORIZED REPRESENTATIVE OF THE ESTATE OF BODD, ET AL. *v.*

Cheramie Bo Truc #11, Inc., et al. C. A. 5th Cir. Certiorari denied. Reported below: 774 F. 2d 1322.

No. 85–1363. O'Mahony *v.* Chicago Transit Authority. C. A. 7th Cir. Certiorari denied. Reported below: 779 F. 2d 54.

No. 85–1364. Clady et al. *v.* County of Los Angeles. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 2d 1421.

No. 85–1368. Galardi et al. *v.* Tokai Bank of California et al. C. A. 9th Cir. Certiorari denied. Reported below: 780 F. 2d 1025.

No. 85–1369. Zoldessy *v.* Founders Title Co. C. A. 11th Cir. Certiorari denied. Reported below: 773 F. 2d 1175.

No. 85–1371. Department of Finance of the City of New York *v.* Forbes, Inc. Ct. App. N. Y. Certiorari denied. Reported below: 66 N. Y. 2d 243, 487 N. E. 2d 251.

No. 85–1374. Loeb, Individually and as Executrix of the Estate of Loeb, et al. *v.* Bergeron. C. A. 1st Cir. Certiorari denied. Reported below: 777 F. 2d 792.

No. 85–1376. Glasgow, Inc. *v.* Noetzel et ux. Super. Ct. Pa. Certiorari denied. Reported below: 338 Pa. Super. 458, 487 A. 2d 1372.

No. 85–1383. Kaonohi Ohana, Ltd. *v.* Sutherland et al. C. A. 9th Cir. Certiorari denied. Reported below: 776 F. 2d 1425.

No. 85–1397. Vasquez *v.* New York. Ct. App. N. Y. Certiorari denied. Reported below: 66 N. Y. 2d 968, 489 N. E. 2d 757.

No. 85–1417. Tyler-Barcomb et al. *v.* Connecticut. Sup. Ct. Conn. Certiorari denied. Reported below: 197 Conn. 666, 500 A. 2d 1324.

No. 85–1472. Ballard *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 779 F. 2d 287.

No. 85–1487. Matchett *v.* Chicago Council of Lawyers et al. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 134 Ill. App. 3d 1153, 496 N. E. 2d 365.

No. 85-1495. PECIC *v.* UNITED STATES; and
No. 85-1502. MURPHY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 778 F. 2d 963.

No. 85-1507. GALLO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 782 F. 2d 1037.

No. 85-1508. WEINSTEIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 762 F. 2d 1522 and 778 F. 2d 673.

No. 85-5729. HOWELL *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 64 Md. App. 724.

No. 85-5858. COOPER *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 85-5920. POOL *v.* ARMONTROUT, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 85-6035. FOX *v.* CITY OF DES MOINES. Sup. Ct. Iowa. Certiorari denied.

No. 85-6083. LUCK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 772 F. 2d 719.

No. 85-6127. ROY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 771 F. 2d 54.

No. 85-6198. CALETTA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 780 F. 2d 1014.

No. 85-6294. POREE *v.* CHRANS, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 85-6343. TURNER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 2.

No. 85-6355. KRZYZAK *v.* UNITED STATES POSTAL SERVICE. C. A. 2d Cir. Certiorari denied. Reported below: 760 F. 2d 253.

No. 85-6362. WILKINS *v.* LYLES, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 782 F. 2d 1037.

No. 85-6363. LINDSEY *v.* PENNSYLVANIA. C. A. 3d Cir. Certiorari denied.

No. 85-6375. KNIES *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 125 Wis. 2d 584, 375 N. W. 2d 215.

No. 85-6379. JONES *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 777 F. 2d 699.

No. 85-6397. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 781 F. 2d 903.

No. 85-6398. VARGAS *v.* COUGHLIN, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 113 App. Div. 2d 1037, 494 N. Y. S. 2d 255.

No. 85-6410. MITCHELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 780 F. 2d 1029.

No. 85-6413. PETERSON *v.* BOWEN, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 778 F. 2d 791.

No. 85-6428. HOPPER *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari denied. Reported below: 780 F. 2d 1021.

No. 85-6441. NOLL *v.* WILKERSON ET AL. C. A. 8th Cir. Certiorari denied.

No. 85-6462. WOOD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 780 F. 2d 555.

No. 85-6464. GOOD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 780 F. 2d 773.

No. 85-6480. JOOST *v.* O'BRIEN, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 85-6506. LUCAS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 497 A. 2d 1070.

No. 85-690. MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* FELDER. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 765 F. 2d 1245.

No. 85-882. LOVSHIN *v.* DEPARTMENT OF THE NAVY. C. A. Fed. Cir. Certiorari denied. JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE BLACKMUN would grant certiorari. Reported below: 767 F. 2d 826.

No. 85-1352. Florida Fruit & Vegetable Assn. et al. *v.* Brock, Secretary of Labor, et al. C. A. 11th Cir. Motion of Ramirez, Ruiz, and Carrizalez for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 771 F. 2d 1455.

No. 85-6376. Andrade *v.* Texas. Ct. Crim. App. Tex.; and

No. 85-6439. Wise *v.* Virginia. Sup. Ct. Va. Certiorari denied. Reported below: No. 85-6376, 700 S. W. 2d 585; No. 85-6439, 230 Va. 322, 337 S. E. 2d 715.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 85-659. Hopfmann *v.* United States Federal Election Commission et al., 474 U. S. 1038;

No. 85-5277. O'Driscoll *v.* United States, *ante*, p. 1020;

No. 85-5415. Roberts *v.* Rutgers State University of New Jersey et al., 474 U. S. 952;

No. 85-5967. Dryden *v.* Safeco Insurance Company of America, *ante*, p. 1049;

No. 85-6040. Richards et ux. *v.* Swinebroad & Denton Auctioneers et al., *ante*, p. 1026; and

No. 85-6099. Rodman *v.* Tate, Superintendent, Chillicothe Correctional Institute, et al., *ante*, p. 1028. Petitions for rehearing denied.

No. 85-429. Exxon Corp. *v.* United States et al., 474 U. S. 1105. Motion for leave to file petition for rehearing denied. Justice Powell took no part in the consideration or decision of this motion.

No. 85-5835. In re Patrascu, 474 U. S. 1100. Motion for leave to file petition for rehearing denied.

April 11, 1986

Certiorari Denied

No. 85-6679 (A-762). Thomas *v.* Wainwright, Secretary, Florida Department of Corrections. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, denied. Certiorari denied. Reported below: 486 So. 2d 574.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay and the petition for writ of certiorari and would vacate the death sentence in this case.

APRIL 15, 1986

Certiorari Denied

No. 85-6714 (A-777). THOMAS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Application for certificate of probable cause, presented to JUSTICE POWELL, and by him referred to the Court, denied. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, denied. Certiorari denied. Reported below: 788 F. 2d 684.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for certificate of probable cause, the application for stay, and the petition for writ of certiorari and would vacate the death sentence in this case.

APRIL 21, 1986

Appeals Dismissed

No. 85-1093. RYNIAWEC *v.* TSAPIS, JUDGE, CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA, ET AL. Appeal from Sup. Ct. App. W. Va. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85-6403. DYSON *v.* TEXAS A & M UNIVERSITY. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85–1343. HUMPHREY ET AL., DBA HUMPHREY & HAAS *v.* COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSN. Appeal from Sup. Ct. Iowa dismissed for want of substantial federal question. JUSTICE WHITE, JUSTICE BLACKMUN, and JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 377 N. W. 2d 643.

No. 85–1392. PULLUM *v.* CINCINNATI, INC., ET AL. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 476 So. 2d 657.

No. 85–1407. CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., ET AL. *v.* PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 66 N. Y. 2d 369, 488 N. E. 2d 83.

No. 85–6499. STARADUMSKY *v.* RHODE ISLAND. Appeal from Dist. Ct. R. I. dismissed for want of substantial federal question.

Certiorari Granted—Reversed and Remanded. (See No. 85–531, *ante*, p. 796.)

Certiorari Granted—Vacated and Remanded. (See also No. 85–1150, *ante*, p. 809.)

No. 85–299. ROYAL CENTER, INC. *v.* LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, CULINARY WORKERS UNION, LOCAL 226, ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *AT&T Technologies, Inc.* v. *Communications Workers*, *ante*, p. 643. Reported below: 754 F. 2d 835.

No. 85–875. RHODE ISLAND *v.* MANOCCHIO. Sup. Ct. R. I. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Delaware* v. *Van Arsdall*, *ante*, p. 673. Reported below: 496 A. 2d 931.

No. 85–1026. TEXAS *v.* JACKSON. Ct. Crim. App. Tex. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Texas* v. *McCullough*, *ante*, p. 134. Reported below: —— S. W. 2d ——.

No. 85–1434. TIERNEY ET AL. *v.* CITY OF TOLEDO ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Teachers* v. *Hudson*, *ante*, p. 292. Reported below: 785 F. 2d 310.

Miscellaneous Orders

No. — — —. CRIBB ET AL. *v.* PELHAM ET AL.; and
No. — — —. COX *v.* LEMAIRE, FAUNTZ & KATZNELSON. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. D–554. IN RE DISBARMENT OF WOOD. It is ordered that Jack R. Wood, of Shelbyville, Ind., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–555. IN RE DISBARMENT OF KERPAN. It is ordered that William John Kerpan, of Marysville, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 74, Orig. GEORGIA *v.* SOUTH CAROLINA. First Report of the Special Master received and ordered filed. [For earlier order herein, see, *e. g.*, 434 U. S. 1057.]

No. 85–236. EICHENLAUB *v.* YURKY ET AL. C. A. 3d Cir. [Certiorari granted, 474 U. S. 1049.] Motion of respondents Zimmerman and Wicker for divided argument granted. Request for additional time for oral argument denied.

No. 85–473. CARGILL, INC., ET AL. *v.* MONFORT OF COLORADO, INC. C. A. 10th Cir. [Certiorari granted, 474 U. S. 1049.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

No. 85–488. OHIO CIVIL RIGHTS COMMISSION ET AL. *v.* DAYTON CHRISTIAN SCHOOLS, INC., ET AL. C. A. 6th Cir. [Probable jurisdiction postponed, 474 U. S. 978.] Motion of appellees for leave to file a supplemental brief after argument granted.

No. 85-660. COLORADO *v.* CONNELLY. Sup. Ct. Colo. [Certiorari granted, 474 U. S. 1050.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 85-701. FEDERAL ELECTION COMMISSION *v.* MASSACHUSETTS CITIZENS FOR LIFE, INC. C. A. 1st Cir. [Probable jurisdiction noted, 474 U. S. 1049.] Motions of Chamber of Commerce of the United States, Joseph M. Scheidler et al., and Catholic League for Religious and Civil Rights for leave to file briefs as *amici curiae* granted.

No. 85-792. INTERSTATE COMMERCE COMMISSION *v.* BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL.; and

No. 85-793. MISSOURI-KANSAS-TEXAS RAILROAD CO. *v.* BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 1081.] Motion of petitioners to dispense with printing the joint appendix granted.

No. 85-937. WEST VIRGINIA *v.* UNITED STATES. C. A. 4th Cir. [Certiorari granted, *ante*, p. 1009.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 85-1206. ROSE *v.* ROSE ET AL. Appeal from Ct. App. Tenn. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 85-1217. CITY OF SPRINGFIELD, MASSACHUSETTS *v.* KIBBE, ADMINISTRATRIX OF THE ESTATE OF THURSTON. C. A. 1st Cir. [Certiorari granted, *ante*, p. 1064.] Motion of respondent for leave to proceed further herein *in forma pauperis* granted.

No. 85-1377. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES *v.* SYNAR, MEMBER OF CONGRESS, ET AL.;

No. 85-1378. UNITED STATES SENATE *v.* SYNAR, MEMBER OF CONGRESS, ET AL.; and

No. 85-1379. O'NEILL, SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL. *v.* SYNAR, MEMBER OF CONGRESS, ET AL. D. C. D. C. [Probable jurisdiction noted, *ante*, p. 1009.] Motions of Edward Blankstein and American Jewish Congress for leave to file briefs as *amici curiae* out of time granted.

No. 85-6214. LINDAHL *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until May 12, 1986, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 85–6418. ISSA *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until May 12, 1986, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 85–6335. IN RE WEEMS;
No. 85–6395. IN RE SMITH;
No. 85–6400. IN RE PETERS; and
No. 85–6407. IN RE CARSON. Petitions for writs of mandamus denied.

Probable Jurisdiction Noted or Postponed

No. 85–1180. MEESE, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. *v.* KEENE. Appeal from D. C. E. D. Cal. Probable jurisdiction noted. Reported below: 619 F. Supp. 1111.

No. 85–993. HOBBIE *v.* UNEMPLOYMENT APPEALS COMMISSION OF FLORIDA ET AL. Appeal from Dist. Ct. App. Fla., 5th Dist. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 475 So. 2d 711.

*Certiorari Granted**

No. 85–129. WIMBERLY *v.* LABOR AND INDUSTRIAL RELATIONS COMMISSION OF MISSOURI ET AL. Sup. Ct. Mo. Certiorari granted. Reported below: 688 S. W. 2d 344.

No. 85–1449. TOWN OF NEWTON ET AL. *v.* RUMERY. C. A. 1st Cir. Certiorari granted. Reported below: 778 F. 2d 66.

No. 85–1277. SCHOOL BOARD OF NASSAU COUNTY, FLORIDA, ET AL. *v.* ARLINE. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. In addition, the parties are requested to brief and argue the following question: "Whether one who is afflicted with the contagious, infectious disease of tuberculosis is precluded from being 'otherwise qualified' for the job of elementary-school teacher, within the meaning of § 504 of the Rehabilitation Act of 1973, 29 U. S. C. § 794?" Reported below: 772 F. 2d 759.

JUSTICE STEVENS, dissenting.

The Court of Appeals remanded this case for further proceedings, and concluded its opinion as follows:

> "In this case, the district court made no findings resolving the numerous factual disputes as to whether the risks entailed in retaining Arline in her elementary school position precluded her from having the necessary physical qualifications for the job, whether the same would be true if she were transferred to a position teaching less susceptible individuals, or whether the costs involved in accommodating her would place undue burdens on the school system. Rather, it simply concluded that the school board was exempt from any duty whatever to weigh the actual costs and risks involved in accommodating Arline because of an overriding 'duty to the public it serves.' Section 504 by its existence establishes that such a duty cannot be used to shield an entity from liability for making decisions which 'arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program.' *Southeastern Community College* [v. *Davis*, 442

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*[REPORTER'S NOTE: An order granting certiorari in No. 85–99, *Messerschmitt Bolkow Blohm, GmbH.* v. *Walker et al.*, issued on April 21, 1986, was vacated on June 9, 1986. See 476 U. S. 1168.]

> U. S. 397, 412 (1979)]. We therefore remand this case for further findings as to whether the risks of infection precluded Mrs. Arline from being 'otherwise qualified' for her job and if so whether it was possible to make some reasonable accommodation for her in that teaching position, in another position teaching less susceptible individuals, or in some other kind of position in the school system." 772 F. 2d 759, 765 (CA11 1985) (footnotes omitted).

In my opinion, it is inappropriate for this Court to direct the parties to present argument on the "otherwise qualified" issue before the District Court has an opportunity to make the findings ordered by the Court of Appeals. It is especially inappropriate because petitioner did not seek review on that issue. Accordingly, I respectfully dissent.

No. 85–6461. MARTIN *v.* OHIO. Sup. Ct. Ohio. Motion of Ohio Public Defender Commission for leave to file a brief as *amicus curiae* granted. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question IV presented by the petition. Reported below: 21 Ohio St. 3d 91, 488 N. E. 2d 166.

Certiorari Denied. (See also Nos. 85–1093 and 85–6403, *supra.*)

No. 85–834. NIXON, ADMINISTRATOR OF THE ESTATE OF NIXON *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 11th Cir. Certiorari denied. Reported below: 770 F. 2d 1083.

No. 85–886. BRUNO *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 197 Conn. 326, 497 A. 2d 758.

No. 85–917. HOLLINS ET AL. *v.* POWELL ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 773 F. 2d 191.

No. 85–1010. PASCHALL ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 772 F. 2d 68.

No. 85–1065. BARTIMO *v.* HORSEMEN'S BENEVOLENT & PROTECTIVE ASSN. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 771 F. 2d 894.

No. 85–1176. COHEN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied.

No. 85–1191. Painters Local Union No. 164 of the Brotherhood of Painters, Decorators & Paperhangers of America et al. *v.* Epley, Individually and dba Epley Coatings et al. C. A. 11th Cir. Certiorari denied. Reported below: 764 F. 2d 1509.

No. 85–1194. Jackson *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 770 F. 2d 1550.

No. 85–1197. Claiborne, United States District Judge *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 765 F. 2d 784.

No. 85–1209. Kahlenberg *v.* Immigration and Naturalization Service. C. A. 11th Cir. Certiorari denied. Reported below: 763 F. 2d 1346.

No. 85–1224. Kerkman *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 779 F. 2d 53.

No. 85–1266. Zimmerman et al. *v.* Handley, Administrator, Agricultural Marketing Service, Department of Agriculture, et al. C. A. 8th Cir. Certiorari denied. Reported below: 782 F. 2d 1047.

No. 85–1278. Herrera-Vinegas *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 778 F. 2d 788.

No. 85–1287. Board of Regents of the University of Oklahoma *v.* Equal Employment Opportunity Commission. C. A. 10th Cir. Certiorari denied. Reported below: 774 F. 2d 999.

No. 85–1324. Washington State Nurses Assn. *v.* Washington State Hospital Commission et al. C. A. 9th Cir. Certiorari denied. Reported below: 773 F. 2d 1044.

No. 85–1336. Walsh, Chief of Police of Orlando, Florida *v.* Central Florida Nuclear Freeze Campaign et al. C. A. 11th Cir. Certiorari denied. Reported below: 774 F. 2d 1515.

No. 85–1393. Bell et al. *v.* Crawford County, Arkansas, et al. Sup. Ct. Ark. Certiorari denied. Reported below: 287 Ark. 251, 697 S. W. 2d 910.

No. 85-1395. National Steel Corp. *v.* Public Service Commission of West Virginia. Sup. Ct. App. W. Va. Certiorari denied.

No. 85-1396. Royster *v.* Board of Trustees of Anderson County School District No. 5 et al. C. A. 4th Cir. Certiorari denied. Reported below: 774 F. 2d 618.

No. 85-1402. City of Corona et al. *v.* Superior Court of California for Riverside County (Ebel et al., Real Parties in Interest). Sup. Ct. Cal. Certiorari denied. Reported below: 39 Cal. 3d 740, 705 P. 2d 347.

No. 85-1408. Local 710, International Brotherhood of Teamsters *v.* McGinnis et al. C. A. 7th Cir. Certiorari denied. Reported below: 774 F. 2d 196.

No. 85-1419. Naegele Outdoor Advertising Company of Louisville, a Division of Naegele, Inc. *v.* Moulton et al. C. A. 6th Cir. Certiorari denied. Reported below: 773 F. 2d 692.

No. 85-1420. Dixon *v.* City of Winston-Salem, North Carolina, et al. C. A. 4th Cir. Certiorari denied.

No. 85-1421. Terrain Enterprises, Inc. *v.* Western Casualty & Surety Co. C. A. 5th Cir. Certiorari denied. Reported below: 774 F. 2d 1320.

No. 85-1422. Sherman Treaters Ltd. *v.* Ahlbrandt. C. A. Fed. Cir. Certiorari denied. Reported below: 785 F. 2d 322.

No. 85-1424. Barge Ocean States *v.* Amoco Oil Co. et al. C. A. 11th Cir. Certiorari denied. Reported below: 766 F. 2d 473.

No. 85-1426. Coakley & Williams, Inc. *v.* Shatterproof Glass Corp. C. A. 4th Cir. Certiorari denied. Reported below: 778 F. 2d 196.

No. 85-1427. Peeples *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 85-1428. Native Village of Stevens *v.* Smith, Commissioner of Health and Human Services of Alaska, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 2d 1486.

No. 85-1432. DAVIS *v.* CITY OF ROSWELL, GEORGIA, ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 255 Ga. 158, 335 S. E. 2d 582.

No. 85-1438. CHARLOTTE MEMORIAL HOSPITAL AND MEDICAL CENTER ET AL. *v.* OLIPHANT ET AL. C. A. 4th Cir. Certiorari denied.

No. 85-1440. SPRIGGINS ET UX. *v.* FIRST NATIONAL BANK OF LEA COUNTY ET AL. C. A. 10th Cir. Certiorari denied.

No. 85-1444. ALLEN GROUP, INC., ET AL. *v.* FRICKE ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 776 F. 2d 1062.

No. 85-1447. CABRIOLET PORSCHE + AUDI, INC. *v.* AMERICAN HONDA MOTOR CO., INC. C. A. 11th Cir. Certiorari denied. Reported below: 773 F. 2d 1193.

No. 85-1450. HORTON *v.* MILLER CHEMICAL CO., INC. C. A. 7th Cir. Certiorari denied. Reported below: 776 F. 2d 1351.

No. 85-1451. HOWARD, DBA LAFAYETTE COMPONENTS *v.* CONTINENTAL CASUALTY CO. C. A. 7th Cir. Certiorari denied. Reported below: 775 F. 2d 876.

No. 85-1457. CATERPILLAR TRACTOR CO. *v.* WHEELER ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 108 Ill. 2d 502, 485 N. E. 2d 372.

No. 85-1458. PETERSON *v.* KENNEDY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 771 F. 2d 1244.

No. 85-1460. VESSICHIO *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 197 Conn. 644, 500 A. 2d 1311.

No. 85-1462. WALLACE *v.* HERRON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 778 F. 2d 391.

No. 85-1467. HOFFMAN *v.* DAVIDOFF EXTENSION, S. A. C. A. 11th Cir. Certiorari denied. Reported below: 774 F. 2d 1178.

No. 85–1470. COMMUNITY NUTRITION INSTITUTE ET AL. *v.* YOUNG, COMMISSIONER OF FOOD AND DRUG ADMINISTRATION, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 249 U. S. App. D. C. 150, 773 F. 2d 1356.

No. 85–1473. EDWARDS *v.* GOLDBERG ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 779 F. 2d 50.

No. 85–1474. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 780 F. 2d 1029.

No. 85–1475. KALIN ET AL. *v.* CASILLAS, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied. Reported below: 780 F. 2d 533.

No. 85–1478. BOYCE *v.* RIDGELY ET AL., PERSONAL REPRESENTATIVES OF THE ESTATE OF BOYCE. Ct. Sp. App. Md. Certiorari denied.

No. 85–1484. OWEN STEEL CO., INC., ET AL. *v.* SOUTH CAROLINA TAX COMMISSION ET AL. Sup. Ct. S. C. Certiorari denied. Reported below: 287 S. C. 274, 337 S. E. 2d 880.

No. 85–1489. HILGEFORD ET AL. *v.* PEOPLES BANK, PORTLAND, INDIANA. C. A. 7th Cir. Certiorari denied. Reported below: 776 F. 2d 176.

No. 85–1497. FLYNN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 782 F. 2d 1042.

No. 85–1531. GUMZ *v.* MORRISSETTE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 772 F. 2d 1395.

No. 85–1532. FLEMING *v.* MOORE. C. A. 4th Cir. Certiorari denied. Reported below: 780 F. 2d 438.

No. 85–1534. BOLDEN *v.* UNITED STATES; and
No. 85–1562. EDWARDS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 777 F. 2d 644.

No. 85–1552. MOSHER *v.* INTERNAL REVENUE SERVICE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 775 F. 2d 1292.

No. 85–1557. GREENSPAN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 782 F. 2d 1025.

No. 85-1564. CADE ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 777 F. 2d 703.

No. 85-1566. KAKAR *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 251 U. S. App. D. C. 197, 782 F. 2d 279.

No. 85-1567. VARRASO *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 21 M. J. 129.

No. 85-1580. GIBSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 782 F. 2d 1037.

No. 85-5873. BEST *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 491 A. 2d 480.

No. 85-5911. ROUCO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 765 F. 2d 983.

No. 85-6038. WALKER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 133 Ill. App. 3d 1155, 496 N. E. 2d 18.

No. 85-6074. YOUNG *v.* HENDERSON, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 765 F. 2d 136.

No. 85-6167. CRITTENDON *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 85-6221. GOMETZ *v.* UNITED STATES;
No. 85-6222. FOUNTAIN *v.* UNITED STATES; and
No. 85-6230. SILVERSTEIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 768 F. 2d 790 and 777 F. 2d 345.

No. 85-6227. GLASGOW *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 790 F. 2d 446.

No. 85-6352. BORDAN *v.* STRATTON. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 85-6360. SMITH *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 37.

No. 85-6361. PEARSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 780 F. 2d 1031.

No. 85-6385. Richards *v.* Tennessee. Sup. Ct. Tenn. Certiorari denied.

No. 85-6391. Carter et al. *v.* Louisiana. Ct. App. La., 3d Cir. Certiorari denied.

No. 85-6392. Noll *v.* Petrovsky, Warden, et al. C. A. 8th Cir. Certiorari denied. Reported below: 786 F. 2d 1168.

No. 85-6393. Ray *v.* White, Warden, et al. C. A. 11th Cir. Certiorari denied. Reported below: 777 F. 2d 703.

No. 85-6399. Morris *v.* Christian Hospital. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 682 S. W. 2d 492.

No. 85-6401. Kaltenbach *v.* Louisiana. Ct. App. La., 3d Cir. Certiorari denied.

No. 85-6402. Mueller *v.* Petsock, Superintendent, State Correctional Institution and Diagnostic and Classification Center. C. A. 3d Cir. Certiorari denied.

No. 85-6405. Crawford *v.* Parks et al. Ct. App. Ga. Certiorari denied. Reported below: 176 Ga. App. 497, 336 S. E. 2d 585.

No. 85-6406. Boyer *v.* Frey et al. C. A. 8th Cir. Certiorari denied. Reported below: 786 F. 2d 1168.

No. 85-6408. McDaniel *v.* Kellum. C. A. 5th Cir. Certiorari denied.

No. 85-6409. Cisneros *v.* Merit Systems Protection Board. C. A. Fed. Cir. Certiorari denied.

No. 85-6412. Masters *v.* Whittaker Steel et al. C. A. 6th Cir. Certiorari denied. Reported below: 765 F. 2d 145.

No. 85-6416. Redman *v.* Wainwright, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied. Reported below: 774 F. 2d 1178.

No. 85-6419. Lampkin *v.* Wainwright, Secretary, Florida Department of Corrections. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 480 So. 2d 1320.

No. 85-6420. WHITE *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 134 Ill. App. 3d 262, 479 N. E. 2d 1121.

No. 85-6421. JAHN *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 7th Cir. Certiorari denied. Reported below: 779 F. 2d 54.

No. 85-6423. SHIMKUS *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 135 Ill. App. 3d 981, 482 N. E. 2d 194.

No. 85-6426. CISSELL *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 127 Wis. 2d 205, 378 N. W. 2d 691.

No. 85-6427. MITCHELL *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 85-6431. DALE *v.* SOUTH DAKOTA. Sup. Ct. S. D. Certiorari denied. Reported below: 379 N. W. 2d 811.

No. 85-6432. JACKSON *v.* NEWSOME, WARDEN. Sup. Ct. Ga. Certiorari denied.

No. 85-6434. MORALES *v.* LEFEVRE, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 1.

No. 85-6436. DAY *v.* CONTINENTAL INSURANCE COS. C. A. 8th Cir. Certiorari denied. Reported below: 786 F. 2d 1169.

No. 85-6437. CAMPBELL *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 738 F. 2d 1573.

No. 85-6443. FRENCH *v.* O'LEARY, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 85-6444. LAMPKIN *v.* MORRIS, SUPERINTENDENT, SOUTHEASTERN TRAINING CENTER. C. A. 6th Cir. Certiorari denied. Reported below: 785 F. 2d 309.

No. 85-6445. GUNTHER *v.* WORKMEN'S COMPENSATION APPEAL BOARD. Sup. Ct. Pa. Certiorari denied.

No. 85-6446. HOWARD *v.* FITZPATRICK ET AL. C. A. 11th Cir. Certiorari denied.

No. 85-6449. MAYFIELD *v.* NATIONAL BROADCASTING CORP. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 770 F. 2d 173.

No. 85-6450. RUTLEDGE *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 135 Ill. App. 3d 259, 481 N. E. 2d 348.

No. 85-6452. TODD *v.* REES, SUPERINTENDENT, DEUEL VOCATIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied.

No. 85-6453. SAWDEY *v.* SMITH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 2.

No. 85-6455. FARQUHAR *v.* FOOD AND DRUG ADMINISTRATION. C. A. D. C. Cir. Certiorari denied.

No. 85-6459. OSTROM *v.* HOUSEWRIGHT, DIRECTOR, NEVADA DEPARTMENT OF PRISONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 774 F. 2d 1174.

No. 85-6463. GUICHARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 779 F. 2d 1139.

No. 85-6466. CAMPBELL *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: —— Mont. ——, 711 P. 2d 1357.

No. 85-6469. DRAPER *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 779 F. 2d 45.

No. 85-6473. GARIVAY *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 779 F. 2d 680.

No. 85-6477. WHITE *v.* MOORE, CHAIRMAN AND COMPACT ADMINISTRATOR, MISSOURI BOARD OF PROBATION AND PAROLE, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 786 F. 2d 1169.

No. 85-6479. DORSEY *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 779 F. 2d 680.

No. 85-6490. TIPTON *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 777 F. 2d 699.

No. 85-6493. KAHN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 786 F. 2d 1157.

No. 85-6503. VELLA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 780 F. 2d 1031.

No. 85-6505. RIVERA *v.* GREEN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 775 F. 2d 1381.

No. 85-6513. WRENN *v.* WALTERS, ADMINISTRATOR, VETERANS ADMINISTRATION. C. A. D. C. Cir. Certiorari denied.

No. 85-6520. MEYER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 782 F. 2d 1054.

No. 85-6522. ISENBERG *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 782 F. 2d 1032.

No. 85-6532. TRIPP *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 782 F. 2d 38.

No. 85-6537. HOOKS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 780 F. 2d 1526.

No. 85-6539. HAIRSTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 785 F. 2d 311.

No. 85-6543. JACKSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 784 F. 2d 403.

No. 85-6564. JAMES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 784 F. 2d 1111.

No. 85-6567. RODERICK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 782 F. 2d 1037.

No. 85-6569. HERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 782 F. 2d 1054.

No. 85-6577. SOTELO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 778 F. 2d 1125.

No. 85-6579. VOLINO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 786 F. 2d 1149.

No. 85-6582. TIERNO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 782 F. 2d 1033.

No. 85–791. O'DELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 751 F. 2d 387.

No. 85–1445. DEAS ET AL. *v.* PACCAR, INC. C. A. 11th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 775 F. 2d 1498.

No. 85–1454. WILL ET AL. *v.* COMPREHENSIVE ACCOUNTING CORP. ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 776 F. 2d 665.

No. 85–1177. MILLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 776 F. 2d 978.

No. 85–1235. POYTHRESS ET AL. *v.* KESSLER. C. A. 11th Cir. Certiorari denied. Reported below: 777 F. 2d 1508.

CHIEF JUSTICE BURGER, with whom JUSTICE WHITE joins, dissenting.

This petition presents the question whether a prevailing plaintiff, a lawyer, who acted for herself may recover attorney's fees under 42 U. S. C. § 1988. The Courts of Appeals have uniformly held that a *pro se* litigant may not recover attorney's fees under § 1988, since such a litigant does not require the assistance of an attorney to enforce his rights. *Lovell* v. *Snow*, 637 F. 2d 170 (CA1 1981); *Pitts* v. *Vaughn*, 679 F. 2d 311 (CA3 1982); *Cofield* v. *City of Atlanta*, 648 F. 2d 986 (CA5 1981); *Rheuark* v. *Shaw*, 628 F. 2d 297 (CA5 1980), cert. denied *sub nom. Rheuark* v. *Dallas County, Texas*, 450 U. S. 931 (1981); *Davis* v. *Parratt*, 608 F. 2d 717 (CA8 1979); *Turman* v. *Tuttle*, 711 F. 2d 148 (CA10 1983).

Here, the Court of Appeals for the Eleventh Circuit required the District Court to award fees to respondent Kathleen Kessler, who is an attorney, even though she was proceeding *pro se*. 777 F. 2d 1508 (1985). In the analogous context of attorney's fee awards under the Freedom of Information Act, 5 U. S. C. § 552(a)(4)(E), the Courts of Appeals have reached conflicting conclusions concerning whether a *pro se* plaintiff who is also an attorney is entitled to fees. Compare *Falcone* v. *Internal Revenue Service*, 714 F. 2d 646 (CA6 1983) (attorney-litigant denied fees), cert. denied, 466 U. S. 908 (1984), with *Cazalas* v. *United States Dept. of Justice*, 709 F. 2d 1051 (CA5 1983) (attorney-litigant entitled to fees). District Courts have also reached conflicting determinations concerning an attorney-plaintiff's eligibility for fees under § 1988. Compare *Rybicki* v. *State Board of Elections of Ill.*, 584 F. Supp. 849 (ND Ill. 1984) (attorney-plaintiff entitled to fees), with *Lawrence* v. *Staats*, 586 F. Supp. 1375 (DC 1984) (attorney-plaintiff denied fees).

Because the award of fees under § 1988 and under the Freedom of Information Act have much in common, and because the award of fees in this case is in conflict with the general rule against the award of fees to *pro se* litigants, I would grant certiorari in order to resolve the conflicting decisions in the lower federal courts.

No. 85–1314. WILSEY, INDIVIDUALLY AND AS SPECIAL ADMINISTRATRIX OF THE ESTATE OF HAMMEL *v.* EDDINGFIELD ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 780 F. 2d 614.

JUSTICE WHITE, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

Petitioner Krista Wilsey, an Iowa resident, filed this wrongful-death action in the United States District Court for the Central District of Illinois against respondents, three Illinois physicians. Specifically, petitioner alleged that respondents had been negligent in performing surgery on her 4-year-old daughter, the decedent. Petitioner also requested that she be appointed special administrator of the estate of her deceased daughter so that she could properly prosecute the action: Under Illinois law, a special administrator is appointed to administer a decedent's estate where the only asset of that estate is a cause of action for wrongful death. See Ill. Rev. Stat., ch. 70, ¶2.1 (1986). Jurisdiction was allegedly based on diversity of citizenship under 28 U. S. C. § 1332.

A panel of the United States Court of Appeals for the Seventh Circuit, however, held that diversity jurisdiction was lacking and dismissed the action. 780 F. 2d 614 (1985). Relying on its earlier decision in *Betar* v. *De Havilland Aircraft of Canada, Ltd.*, 603 F. 2d 30 (1979), the Court of Appeals concluded that a special administrator under Illinois law has no personal stake in the proceeds of a wrongful-death action but merely distributes those proceeds to the statutory beneficiaries. Consequently, the statutory beneficiaries and not the special administrator are the real parties in interest whose citizenship is determinative for diversity purposes. Because the decedent's father, one of the statutory beneficiaries, was an Illinois resident, there was incomplete diversity between the parties and diversity jurisdiction was lacking.

This holding, as the Court of Appeals itself recognized, is in conflict with the Tenth Circuit's decision in *Hackney* v. *Newman Memorial Hospital, Inc.*, 621 F. 2d 1069 (1980), in which that court found diversity jurisdiction to be proper in a very similar situation involving the Oklahoma wrongful-death statute. See also, *e. g.*, *Bettin* v. *Nelson*, 744 F. 2d 53 (CA8 1984); *Bianca* v. *Parke-Davis Pharmaceutical Div. of Warner-Lambert Co.*, 723 F. 2d 392 (CA5 1984). Moreover, as Judge Posner pointed out in his dissent from the Court of Appeals' decision not to rehear this case en banc, under Illinois law the special administrator is a fiduciary of the estate's beneficiaries and has sole control over the litigation. See *Rodgers* v. *Consolidated Railroad Corp.*, 136 Ill. App. 3d 191, 193, 482 N. E. 2d 1080, 1082 (1985). Thus, the holding below is also in tension with this Court's decision in *Navarro Savings Assn.* v. *Lee*, 446 U. S. 458, 465 (1980), in which we held that business trustees—"active trustees whose control over the assets held in their names is real and substantial"—were real parties in interest for diversity purposes. See also *Mecom* v. *Fitzsimmons Co.*, 284 U. S. 183 (1931). In addition, defining diversity jurisdiction by the citizenship of the statutory beneficiaries, the approach taken by the Seventh Circuit panel, could make for a difficult and time-consuming determination in ascertaining diversity for jurisdictional purposes. See *Navarro*, *supra*, at 464, n. 13.

Because of the conflict among the Circuits and the tension between the Court of Appeals' holding and our decision in *Navarro*, I would grant certiorari.

No. 85–1399. EDWARD HINES LUMBER COMPANY OF OREGON *v.* LUMBER & SAWMILL WORKERS LOCAL NO. 2588 ET AL. C. A. 9th Cir. Motion of Chamber of Commerce of the United States for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 764 F. 2d 631.

No. 85–1414. LAPEYROUSE GRAIN CORP. ET AL. *v.* NELSON, DBA W. J. NELSON CO. Sup. Ct. Ala. Motion of petitioner to defer consideration of the petition for certiorari denied. Certiorari denied. Reported below: 497 So. 2d 1160.

No. 85-1476. BLACKBURN, WARDEN *v.* FLOWERS. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 779 F. 2d 1115.

No. 85-6147. KING *v.* HEALY ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied. JUSTICE MARSHALL would grant certiorari.

No. 85-6299. ESQUIVEL *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir.; and

No. 85-6365. QUINCE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 85-6299, 777 F. 2d 956; No. 85-6365, 477 So. 2d 535.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 84-1360. CITY OF RENTON ET AL. *v.* PLAYTIME THEATRES, INC., ET AL., *ante*, p. 41;

No. 84-1636. MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY *v.* MATHEWS, *ante*, p. 237;

No. 85-897. KOWALCHUK *v.* UNITED STATES, *ante*, p. 1012;

No. 85-979. SVENDROWSKI *v.* MISSOURI, *ante*, p. 1001;

No. 85-982. SAMPSON *v.* RASKIN ET AL., *ante*, p. 1013;

No. 85-1050. TRAHAN *v.* TRAHAN, *ante*, p. 1002;

No. 85-1090. HUDNUT, MAYOR OF CITY OF INDIANAPOLIS, INDIANA, ET AL. *v.* AMERICAN BOOKSELLERS ASSN., INC., ET AL., *ante*, p. 1001;

No. 85-1115. MOATS *v.* WICK, DIRECTOR, UNITED STATES INFORMATION AGENCY, ET AL., *ante*, p. 1017;

No. 85-1123. TAYLOR *v.* UNITED STATES ET AL., *ante*, p. 1018;

No. 85-5386. FLEMING *v.* KEMP, WARDEN, *ante*, p. 1058;

No. 85-5907. LUMBERT *v.* DEROBERTIS, WARDEN, *ante*, p. 1022;

No. 85-5921. IN RE MURPHY, *ante*, p. 1008; and

No. 85-5935. SMITH *v.* SOUTH CAROLINA, *ante*, p. 1031. Petitions for rehearing denied.

No. 85–5952. GISRIEL *v.* BOARD OF APPEALS, MARYLAND DEPARTMENT OF EMPLOYMENT AND TRAINING, *ante*, p. 1023;

No. 85–5964. LEVENTHAL *v.* UNITED STATES DEPARTMENT OF LABOR ET AL., *ante*, p. 1024;

No. 85–5998. RUNNELS *v.* KINGSTON ET AL., *ante*, p. 1025;

No. 85–6009. BOGGS *v.* VIRGINIA, *ante*, p. 1031;

No. 85–6058. LACKHOUSE *v.* MERIT SYSTEMS PROTECTION BOARD ET AL., *ante*, p. 1049;

No. 85–6070. FIELDS *v.* SIMMONS ET AL., *ante*, p. 1027;

No. 85–6139. REEDER *v.* MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY, *ante*, p. 1051;

No. 85–6193. COLATRIANO *v.* CAVE ET AL., *ante*, p. 1052; and

No. 85–6231. SOMMER *v.* CLINTON COUNTY SUPREME COURT ET AL., *ante*, p. 1067. Petitions for rehearing denied.

No. 84–1044. PACIFIC GAS & ELECTRIC CO. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL., *ante*, p. 1. Petition for rehearing denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

No. 85–961. HOLDING *v.* SOVRAN BANK ET AL., *ante*, p. 1036. Petition for rehearing denied. JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 85–6194. RODMAN *v.* REED ET AL., *ante*, p. 1066. Petition for rehearing denied. JUSTICE BRENNAN took no part in the consideration or decision of this petition.

APRIL 22, 1986

Miscellaneous Order

No. A–807 (85–6761). FUNCHESS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, is granted until 5:00 p.m., April 22, 1986.

Certiorari Denied

No. 85–6761 (A–807). FUNCHESS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. The order heretofore entered staying execution of sentence of death until 5:00 p.m., April 22, 1986, is vacated. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, denied. Certiorari denied. Reported below: 788 F. 2d 1443.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay and the petition for writ of certiorari and would vacate the death sentence in this case.

APRIL 28, 1986

Appeals Dismissed

No. 84–1672. HEPPS ET AL. *v.* PHILADELPHIA NEWSPAPERS, INC., ET AL. Appeal from Sup. Ct. Pa. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 506 Pa. 304, 485 A. 2d 374.

No. 85–6501. ROBINSON *v.* UNITED STATES. Appeal from C. A. D. C. Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85–6004. CLARK *v.* FLORIDA. Appeal from Dist. Ct. App. Fla., 5th Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

CHIEF JUSTICE BURGER.

I agree that we should dismiss this improper appeal, and treating the appeal as a petition for certiorari, deny certiorari. The merits of this appeal are utterly frivolous, as were most of appellant's persistent efforts in the courts of Florida. In light of that frivolousness, as well as appellant's status as a member of the Florida Bar, I would award the State costs and fees under Rule 49.2.

This case originated when appellant Bret Clark received a speeding ticket while traveling on the Florida Turnpike on August 12, 1982. At the time he was a law student. Appellant pleaded not guilty, went to trial *pro se* and lost; he was fined $100. On appeal the Fifth Judicial Circuit Court of Florida, sitting in its appellate capacity, affirmed without opinion on September 4, 1984. At some point during 1984 appellant graduated from law school and was admitted to the Florida Bar.

Five months later, on February 14, 1985, appellant sought a writ of certiorari from the Florida Fifth District Court of Appeal. Under Florida Rule of Appellate Procedure 9.100(c), however, a petition for that writ must be filed within 30 days of the order sought to be reviewed, or in this case, no later than October 4, 1984. Appellant claimed that his petition was nevertheless timely under an exception to the rule when denial of appellate review would be fundamentally unfair, because he claimed he did not become aware of the Fifth Judicial Circuit's order of affirmance until January 14, 1985, after his driver's license had been suspended by the Florida Department of Highway Safety and Motor Vehicles. He apparently failed to inform the Circuit Court of his change of address while appeal was pending and to keep a watchful eye on that court's docket, as he was obligated to do if he intended to pursue his claim.

On the merits, he challenged the arresting officer's failure to show him the digital display on the radar detection device indicating that he was exceeding the speed limit. He also challenged the Florida sentencing procedure as discriminating against traffic offenders who plead not guilty by imposing "double or nothing" fines that exceed the fine imposed if they plead guilty, thereby discouraging offenders from protesting their guilt. Finally, he challenged the constitutionality of the 55-mile-per-hour speed limit. The Court of Appeal ordered the State to show cause why the petition should not be granted, and the State filed a response raising the jurisdictional bar based on the untimely filing of the petition. On April 15, 1985, the court dismissed the petition for lack of jurisdiction.

Undeterred, appellant filed a motion for rehearing which was stricken as untimely. Over a month later he filed a motion to recall mandate and a suggestion for reconsideration. At this point the State, frustrated with appellant's frivolous litigious efforts, filed a response pointing out that the court had no power to recall mandate, and that no mandate had even issued. The State also moved for attorney's fees pursuant to Fla. Stat. § 57.105 (1985), which provides for an award of fees where a losing party's position is completely lacking any "justiciable issue" of law or fact. The State emphasized that appellant's motion for recall of mandate

> "demonstrates a startling ignorance of the law, and, more importantly, an unwillingness to expend even minimal effort

> to research facts or law before taking the time of this counsel and this honorable court. . . . [T]he correspondence and pleadings in this cause . . . amply demonstrate petitioner's misconception that his law training entitles him to file whatever he wants whenever he wants without the slightest regard for the law or judicial resources." App. to Juris. Statement A-4.

Appellant responded by citing a Florida District Court of Appeal decision from 1980 supporting his position that the court could consider his rehearing motion. See *Rogers* v. *State Farm Mutual Automobile Insurance Co.*, 390 So. 2d 138 (Fla. App. 1980). He also asserted that the State's motion for fees "demonstrate[d] a shocking degree of arrogance and lack of professionalism," App. to Juris. Statement A-7, and that the State, "by its motion, reveals that it has nothing but contempt for a law student who does not simply permit an injustice to run its course, paying an unjust penalty." *Id.*, at A-8.

The Court of Appeal issued an order to show cause why sanctions should not be awarded, and appellant again responded that his efforts were not frivolous, relying on the same 1980 case. He claimed his driver's "license was suspended without notice or an opportunity to be heard." *Id.*, at A-10. The State filed a notice of supplemental authority pointing out that the 1980 case upon which appellant relied had been *reversed* by the Florida Supreme Court in 1981. See *State Farm Mutual Automobile Insurance Co.* v. *Judges of District Court of Appeal, Fifth District*, 405 So. 2d 980 (Fla. 1981), *reversing* 390 So. 2d 138 (Fla. App.). The Court of Appeal thereafter denied the motion for recall of mandate and awarded attorney's fees in the amount of $100 against appellant pursuant to Florida Rule of Appellate Procedure 9.400(b).

Not one to suffer defeat lightly, appellant untimely moved the Court of Appeal to review its order granting the nominal $100 fee award. *For the first time*, as appellant acknowledges, see Juris. Statement 2, he claimed that the award of sanctions was in retaliation for certain correspondence he had sent to the Court of Appeal complaining about the "denial" of appellate review of his conviction, in violation of his First Amendment right to petition for redress of grievances. He contended that the fee statute was therefore "repugnant to the Constitution and laws of the United States." App. to Juris. Statement A-14. The Court of Appeal summarily denied his motion to review the award on September 12, 1985, and the Florida Supreme Court informed appellant that it lacked jurisdiction to review orders granting fee awards under Rule 9.400(c) on November 14, 1985.

From the Florida Fifth District Court of Appeal's "final" order, appellant brings this appeal challenging the fee award as in violation of the First Amendment. He claims Fla. Stat. § 57.105 (1985) permits an award of fees based "upon the vague concept of what constitutes a 'justiciable issue.'" Juris. Statement 2. This claim, coming from an attorney, is so utterly frivolous as to not warrant any further discussion. All this suggests is that appellant considers the judicial system a laboratory where small boys can play.

Rule 49.2 provides that "[w]hen an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages." Plainly this is an appropriate case for sanctions. As the State makes clear:

> "This case, although the subject of considerable judicial attention, has been troubled by two common elements—untimeliness and only casual observance of proper state procedural rules. Every pleading Clark filed after the affirmance of his speeding ticket was either late or inappropriate and filed with but a minimal knowledge of relevant procedure. That which started him litigating in the Fifth District Court of Appeal was filed almost four months late. Even after being informed that the court was without jurisdiction to entertain the petition, Clark nevertheless persisted in his efforts to obtain something to which he was not legally entitled under state law. When that persistence resulted in a motion for him to pay for the state's costs in the litigation, he was given an opportunity to show cause why such an assessment should not issue. At most, Clark only offered reasons which had nothing to do with the purpose of the motion." Motion to Dismiss 4–5.

Appellant now claims that he "is the victim of a state court system which, confronted by a critical and recalcitrant defendant, decided to punish him for attempting to assert his right to a day in court on an appeal from a conviction in a presumably routine traffic case." Brief Opposing Motion to Dismiss 1. This distorted framing of the issue simply illuminates the frivolousness of this appeal. The extended proceedings in this case make clear that no one has denied Bret Clark his day in court. Rather, appellant has demonstrated a contempt for the Florida courts and the system of justice by repeatedly ignoring filing deadlines and by raising patently frivolous claims. As a result of his protracted efforts to keep this case alive, the State has been denied its right to put an end to this tedious litigation.

This curious sequence suggests the dangers of a system of legal education that trains students in technique without instilling a sense of professional responsibility and ethics—a bit like giving a small boy a loaded pistol without instruction as to when and how it is to be used. Had he thus conducted himself after finishing law school and before being admitted to practice the State would plainly have been entitled to conclude that he was unfit to be a member of the Bar.

I would impose a penalty of $1,000 in favor of the State against appellant, who, as a member of the Florida Bar, has abused his privilege to practice law by repeatedly filing frivolous papers.

Certiorari Granted—Vacated and Remanded

No. 85–1295. TYUS *v.* MARTINEZ. C. A. 10th Cir. Certiorari granted, judgment vacated, and case remanded to the Court of Appeals to consider the question of mootness. Reported below: 771 F. 2d 424 and 778 F. 2d 553.

No. 85–1446. UNITED RETAIL WORKERS UNION, LOCAL 881, CHARTERED BY THE UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *NLRB* v. *Financial Institution Employees, ante,* p. 192. Reported below: 774 F. 2d 752.

No. 85–6213. MURPHY *v.* HOLLAND, WARDEN. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Michigan* v. *Jackson, ante,* p. 625. Reported below: 776 F. 2d 470.

Certiorari Dismissed

No. 84–6903. MATTHESON *v.* PHELPS, SECRETARY, LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS. C. A.

5th Cir. Petition for writ of certiorari dismissed as moot. Reported below: 751 F. 2d 1432.

Miscellaneous Orders

No. — — —. SMITH *v.* TRANSWORLD DRILLING COMPANY VESSEL. Motion to direct the Clerk to file a petition for writ of certiorari out of time denied.

No. A–749. TREADWELL FORD, INC. *v.* CAMPBELL ET AL. Sup. Ct. Ala. Application for stay, addressed to JUSTICE BLACKMUN and referred to the Court, denied. JUSTICE BLACKMUN would deny this application as moot.

No. D–519. IN RE DISBARMENT OF DAVIS. Disbarment entered. [For earlier order herein, see 474 U. S. 896.]

No. 85–494. CALIFORNIA FEDERAL SAVINGS & LOAN ASSN. ET AL. *v.* GUERRA, DIRECTOR, DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, ET AL. C. A. 9th Cir. [Certiorari granted, 474 U. S. 1049.] Motion of American Civil Liberties Union et al. for leave to participate in oral argument as *amici curiae*, for divided argument, and for additional time for oral argument denied.

No. 85–495. ANSONIA BOARD OF EDUCATION ET AL. *v.* PHILBROOK ET AL. C. A. 2d Cir. [Certiorari granted, 474 U. S. 1080.] Motion of respondent Ansonia Federation of Teachers for divided argument and for additional time for oral argument denied.

No. 85–767. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION ET AL. *v.* CREST STREET COMMUNITY COUNCIL, INC., ET AL. C. A. 4th Cir. [Certiorari granted, 474 U. S. 1049.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 85–6491. IN RE PALLETT. Petition for writ of habeas corpus denied.

No. 85–6304. IN RE PARKER;
No. 85–6396. IN RE WOLLAK;
No. 85–6488. IN RE HEGWOOD; and
No. 85–6517. IN RE FRAZIER. Petitions for writs of mandamus denied.

No. 85–6364. IN RE MAY. Petition for writ of mandamus and/or prohibition denied.

Certiorari Denied. (See also Nos. 84–1672, 85–6501, and 85–6004, *supra.*)

No. 85–1122. BEHREND ET AL. *v.* GODWIN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 774 F. 2d 1150.

No. 85–1234. BENAVIDES, WEBB COUNTY JUDGE, ET AL. *v.* GONZALEZ. C. A. 5th Cir. Certiorari denied. Reported below: 774 F. 2d 1295.

No. 85–1318. ADAMICK ET AL. *v.* HODEL, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 776 F. 2d 1052.

No. 85–1413. MARCANTONIO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 776 F. 2d 1051.

No. 85–1464. NEWKIRK ET AL. *v.* BIGARD, INDIVIDUALLY AND DBA B & B OIL CO., ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 109 Ill. 2d 28, 485 N. E. 2d 321.

No. 85–1465. MARYLAND STATE TEACHERS ASSN., INC., ET AL. *v.* HUGHES, GOVERNOR OF MARYLAND, ET AL. C. A. 4th Cir. Certiorari denied.

No. 85–1468. WOODS *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA (JONES, REAL PARTY IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 85–1469. MASSACHUSETTS DEPARTMENT OF EDUCATION ET AL. *v.* DAVID D. C. A. 1st Cir. Certiorari denied. Reported below: 775 F. 2d 411.

No. 85–1482. TILKENS, PERSONAL REPRESENTATIVE OF THE ESTATE OF JONES *v.* PARKS. Ct. App. Okla. Certiorari denied. Reported below: 710 P. 2d 123.

No. 85–1492. BORG-WARNER LEASING, A DIVISION OF BORG-WARNER ACCEPTANCE CORP. *v.* DOYLE ELECTRIC CO., INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 767 F. 2d 936.

No. 85–1496. ALPERSTEIN ET AL. *v.* THREE LAKES WATER AND SANITATION DISTRICT. Ct. App. Colo. Certiorari denied. Reported below: 710 P. 2d 1186.

No. 85–1498. MOORE ET AL. *v.* VOLKSWAGENWERK, A. G., ET AL. C. A. 4th Cir. Certiorari denied.

No. 85–1509. VINTILLA ET AL. *v.* UNITED STATES STEEL CORPORATION PLAN FOR EMPLOYEE PENSION BENEFITS. C. A. 3d Cir. Certiorari denied. Reported below: 782 F. 2d 1033.

No. 85–1516. GIAMMARIO ET AL. *v.* TRENTON BOARD OF EDUCATION ET AL. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 203 N. J. Super. 356, 497 A. 2d 199.

No. 85–1523. CALDWELL *v.* ENOCH, JUDGE, 101ST DISTRICT COURT OF TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 736 F. 2d 1525.

No. 85–1527. JOHNSON *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 379 N. W. 2d 291.

No. 85–1595. KARAPINKA *v.* UNION CARBIDE CORP. C. A. 2d Cir. Certiorari denied.

No. 85–1601. WINFIELD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 782 F. 2d 1044.

No. 85–1614. POLLINA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 782 F. 2d 358.

No. 85–5591. STEELE *v.* UNITED STATES; and
No. 85–5704. GODFREY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 763 F. 2d 1401.

No. 85–5925. BREWER *v.* GARNER, WARDEN. Ct. Crim. App. Tex. Certiorari denied.

No. 85–5936. THIBODEAU *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 496 A. 2d 635.

No. 85–6108. SCOTT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 915.

No. 85–6109. BROWN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 776 F. 2d 397.

No. 85–6164. MILLER *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 300 Ore. 203, 709 P. 2d 225.

No. 85–6171. DAVENPORT ET AL. *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Santa Barbara. Certiorari denied. Reported below: 176 Cal. App. 3d Supp. 10, 222 Cal. Rptr. 736.

No. 85–6200. NEAL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 780 F. 2d 1023.

No. 85–6234. WILLIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 778 F. 2d 789.

No. 85–6274. DEAN *v.* YOUNG, SUPERINTENDENT, WAUPUN CORRECTIONAL INSTITUTION, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 777 F. 2d 1239.

No. 85–6478. QUINN *v.* ARMONTROUT, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS, ET AL. C. A. 8th Cir. Certiorari denied.

No. 85–6482. WILLIAMS *v.* ALABAMA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 775 F. 2d 303.

No. 85–6483. BERGSTROM *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 41 Wash. App. 1056.

No. 85–6484. GRIEDER *v.* ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY ET AL. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 135 Ill. App. 3d 1167, 496 N. E. 2d 1278.

No. 85–6485. HALL *v.* GRANT, SUPERINTENDENT, CORRECTIONS CAMP PROGRAM. C. A. 6th Cir. Certiorari denied. Reported below: 780 F. 2d 1021.

No. 85–6486. EDABURN *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 127 Wis. 2d 563, 378 N. W. 2d 297.

No. 85–6487. HALL *v.* HENDERSON, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 85–6489. JETER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 775 F. 2d 670.

No. 85–6492. JENKINS *v.* RAFFERTY, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 774 F. 2d 1151.

No. 85–6494. HAKIM *v.* WOLVERINE PACKING CO. Sup. Ct. Mich. Certiorari denied. Reported below: 422 Mich. 971.

No. 85–6496. BENEDUM *v.* PERINI, SUPERINTENDENT, MARION CORRECTIONAL INSTITUTION. C. A. 6th Cir. Certiorari denied. Reported below: 782 F. 2d 1041.

No. 85–6497. GATES *v.* JOHNSON, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 779 F. 2d 58.

No. 85–6500. PRIVETT *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 85–6502. SUTTON *v.* MORRIS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 776 F. 2d 1053.

No. 85–6507. KELLER *v.* PETSOCK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND DIAGNOSTIC AND CLASSIFICATION CENTER, ET AL. C. A. 3d Cir. Certiorari denied.

No. 85–6541. SPANN *v.* CLARK. Ct. App. Ga. Certiorari denied. Reported below: 171 Ga. App. 690, 320 S. E. 2d 822.

No. 85–6585. FLEMING *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 198 Conn. 255, 502 A. 2d 886.

No. 85–6597. LLOYD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 787 F. 2d 585.

No. 85–6598. BARKER ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 785 F. 2d 214.

No. 85–6601. CARR *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 795 F. 2d 78.

No. 85–6609. SPEAR *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 790 F. 2d 93.

No. 85–6615. GUZMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 781 F. 2d 428.

No. 85–465. MOUNTAIN PLAINS CONGRESS OF SENIOR ORGANIZATIONS ET AL. *v.* MALCHMAN ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 761 F. 2d 893.

No. 85-744. MAINE *v.* THIBODEAU. Sup. Jud. Ct. Me. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 496 A. 2d 635.

CHIEF JUSTICE BURGER, dissenting.

John Tower's brother reported him missing on October 27, 1983; his mother told police that he had last been seen taking respondent Jay Thibodeau for a test drive in his car that he had for sale. On the morning of October 28, police officers went to the Thibodeau apartment where they spoke with respondent in the presence of his parents for about 10 minutes. Respondent told police that he and Tower had gone for a test drive the previous day, after which Tower dropped him off at home.

Two police officers returned to the Thibodeau household that afternoon and asked respondent to show them the route he and Tower had taken the day before. Respondent agreed and got into the backseat of the police car, a two-door automobile. For about an hour and a half the three retraced the complicated route respondent described to the police, after which respondent was returned home. At no time did respondent ask to leave the car. At one point in the journey respondent asked if he was a suspect. The police stated that he had been the last person seen with the victim, to which respondent replied, "Well, I guess I am."

Two days later police found John Tower's body, shot in the head with a .22-caliber rifle. The next day, police discovered that respondent had traded in his .22-caliber rifle for another gun. Police arrested respondent on November 1. After waving his *Miranda* rights, respondent confessed to the killing.

At trial respondent moved to suppress his statements to the police on the morning and afternoon of October 28 on the ground that he was subjected to custodial interrogations without the necessary *Miranda* warnings. The trial court denied the motion, finding that the statements were "voluntary beyond a reasonable doubt" and that "the circumstances did not constitute custodial interrogation" because respondent had willingly cooperated with the police in generally noncoercive settings.

The Maine Supreme Judicial Court, three justices dissenting, reversed respondent's murder conviction on the ground that the afternoon session with police constituted a custodial interrogation requiring *Miranda* warnings. 496 A. 2d 635 (1985). The court listed the following criteria for determining whether there had been a custodial interrogation: (1) the locale where the statements were made; (2) the party initiating the contact; (3) the existence or nonexistence of probable cause to arrest; (4) the subjective intent of the police; (5) the subjective belief of the defendant; and (6) the focus of the investigation. Applying these factors to this case, the court noted that the officers' suspicions had "increased dramatically since the morning" and that, although no crime had yet been detected, respondent "was the *only* suspect." *Id.*, at 639. Furthermore, a reasonable person would have felt, as did respondent, that he had no choice but to accompany the officers. Finally, by placing him in the backseat of a two-door automobile, police had deprived him of his freedom in a significant way.

This decision of the Maine Supreme Judicial Court illustrates an acute need for clarification of the proper factors to be considered in making the "in custody" determination—a clarification perhaps made necessary by our own lack of clarity as to the standards to be applied. However, four of the six factors enumerated by the Maine court have been rejected by either this Court or other state and federal courts.

(1) We plainly rejected the relevancy of the "subjective intent of the police" in *Berkemer* v. *McCarty*, 468 U. S. 420, 442 (1984), where we stated "[a] policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time."

(2) In *Beckwith* v. *United States*, 425 U. S. 341 (1976), we held that whether police suspicion had focused upon the defendant has no bearing whatever on the "in custody" determination: "'It was the compulsive aspect of custodial interrogation, and not the strength or content of the government's suspicions at the time the questioning was conducted, which led the Court to impose the *Miranda* requirements with regard to custodial questioning.'" *Id.*, at 346–347 (quoting *United States* v. *Caiello*, 420 F. 2d 471, 473 (CA2 1969)). See also *People* v. *Black*, 698 P. 2d 766 (Colo. 1984) (trial court erred in suppressing evidence by considering whether the police's investigation had "focused" on the defendant). Cf. *Green* v. *Superior Court*, 40 Cal. 3d 126, 707 P. 2d 248 (1985) (lack of police suspicion dispositive).

(3) The Ninth Circuit has held that the existence of probable cause at the time of the interrogation is similarly irrelevant. See *United States* v. *Woods*, 720 F. 2d 1022 (1983).

(4) In *Berkemer* we noted that "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." 468 U. S., at 442. The Maine court eschewed this objective test, substituting instead the "subjective belief of the defendant." But see *State* v. *Willis*, 145 Vt. 459, 475, 494 A. 2d 108, 116 (1985) ("Inquiring into the subjective thoughts of either the police or the defendant is likely to pervert the factfinding process in a *Miranda* hearing . . ."); *State* v. *Cruz-Mata*, 138 Ariz. 370, 373, 674 P. 2d 1368, 1371 (1983) (the test is not whether the defendant "felt" he or she was in custody, but rather whether objective indicia of arrest are present, including the site of the questioning, the length of the interrogation, and the method used to summon the individual); *People* v. *Viduya*, 703 P. 2d 1281, 1286 (Colo. 1985) ("We have held that this question of custody turns on an objective assessment of whether a reasonable person in the suspect's position would believe himself to be deprived of his freedom of action in any significant way"). The Oregon Supreme Court espouses yet a third view, stating that the touchstone of the "in custody" determination is whether "the officer should be aware that the totality of circumstances in which the interrogation takes place is such that the person questioned would reasonably believe he is not free to leave." *State* v. *White*, 297 Ore. 302, 310, 685 P. 2d 983, 987 (1984).

With this confusion, it is perhaps helpful to turn for guidance to the *Miranda* decision itself. In *Miranda*, the Court stated that "[b]y custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda* v. *Arizona*, 384 U. S. 436, 444 (1966). As the trial court found, in this case there is no indication that the questioning took place in a context where respondent's freedom was restricted in any significant way. Respondent voluntarily accompanied the officers. He never asked to leave. The police never told him that he was not free to leave, never used any physical restraint of any kind, never threatened him, never confronted him with any incriminating evidence, and dropped him off at home at the end of the trip. Respondent was not being coerced by the "inherently compelling pressures" of a custodial setting. See *Miranda*, *supra*, at 467. As he testified in the suppression hearing, he took police on the long road trip "to keep them off [his] track." It was he, and not the police, who exploited the situation.

Respondent may have therefore unwisely placed himself in an uncomfortable position, but no more so than a suspect who voluntarily comes to the police station for questioning, see *Beckwith, supra; Oregon* v. *Mathiason*, 429 U. S. 492 (1977), or a motorist who is involuntarily detained for questioning concerning a traffic violation. See *Berkemer, supra.*

The Maine Supreme Judicial Court's rejection of the factual findings of the trial court cannot be reconciled with the decisions of this and other courts. I would grant the petition and give plenary consideration to this case.

No. 85-1038. EUROQUILT, INC. *v.* SCANDIA DOWN CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 772 F. 2d 1423.

JUSTICE WHITE, dissenting.

One of the questions presented by this case is whether, in a trademark infringement action under § 43(a) of the Lanham Act, 15 U. S. C. § 1125(a), a district court's finding of "likelihood of confusion" is reviewable under the "clearly erroneous" standard, as a finding of fact, or *de novo*, as a conclusion of law. As I have previously noted, the Courts of Appeals are divided on this question. *Elby's Big Boy of Steubenville, Inc.* v. *Frisch's Restaurants, Inc.*, 459 U. S. 916 (1982) (WHITE, J., dissenting from denial of certiorari). I would grant certiorari to resolve this conflict.

No. 85-1281. HIBERNIA NATIONAL BANK IN NEW ORLEANS *v.* CHUNG, YONG IL, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 774 F. 2d 1043.

JUSTICE WHITE, dissenting.

In this case, the United States Court of Appeals for the Eleventh Circuit held that the penalty wage provision of 46 U. S. C. § 596, which operates in favor of seamen whose wages are not timely paid, applies to wages earned aboard a docked vessel for which no voyage has been scheduled. *Chung, Yong Il* v. *Overseas Navigation Co.*, 774 F. 2d 1043 (1985). This holding conflicts with the decisions in *Compton* v. *Alton Steamship Co.*, 608 F. 2d 96 (CA4 1979), and *Eaton* v. *S.S. Export Challenger*, 376 F. 2d 725 (CA4 1967).

The Eleventh Circuit also held that penalty wages continued to accrue against petitioner despite its filing with the District Court of a $400,000 letter of undertaking, in lieu of a bond, by which petitioner guaranteed payment of all maritime liens against its vessel. In so holding, the Eleventh Circuit rejected the view expressed in *Southern Cross Steamship Co.* v. *Firipis*, 285 F. 2d 651, 659–660 (CA4 1960), and *Swain* v. *Isthmian Lines, Inc.*, 360 F. 2d 81, 88, n. 26 (CA3 1966), that a shipowner may stop the accruing of penalty wages by placing in the hands of the court the allegedly unlawfully withheld wages.

Additionally, the Eleventh Circuit held that penalty wages continued to accrue against petitioner up to the actual payment of the disputed wages shortly prior to oral argument on appeal. This ruling is difficult if not impossible to square with *Pacific Mail S.S. Co.* v. *Schmidt*, 241 U. S. 245 (1916), which we recently characterized with approval as "holding that when an appeal is taken on reasonable grounds, the penalty should not apply to delays in payment beyond the date on which the district court's decree is entered, since those delays are supported by sufficient cause." *Griffin* v. *Oceanic Contractors, Inc.*, 458 U. S. 564, 574, n. 9 (1982).

I would grant certiorari to resolve the questions presented concerning the correct interpretation of the penalty wage statute.

No. 85–1435. LITTLE *v.* FIRST BAPTIST CHURCH, CRESTWOOD. Cir. Ct., City of Chesapeake, Va. Certiorari denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

In this case a state court conducted an election to determine whether petitioner, who was previously elected pastor of the First Baptist Church, Crestwood (Church), is still entitled to serve as pastor. I believe that such an action threatens to erode the First Amendment's prohibitions against entanglement between religious and secular authority, and I would therefore grant the petition for certiorari.

I

In December 1982 petitioner was elected pastor of the Church. The Church is congregational or self-governing, as opposed to associational or hierarchical, which refers to churches that are part of and governed by a larger organization. See generally *Watson* v. *Jones*, 13 Wall. 679, 722–728 (1872). During 1984 petitioner and certain members of the Church became involved in a dispute. Respondents, individual members of the Church, then filed this action for an injunction, claiming to act on behalf of the Church. Respondents alleged that at a duly held meeting of the congregation, a majority had voted to terminate petitioner's employment. Petitioner's answer disputed respondents' authority to initiate the action on behalf of the Church.

The trial court, based only on the pleadings, temporarily enjoined petitioner from entering the Church premises and appointed a commissioner to hold an election of the congregation. After the commissioner had held the election and certified to the court that a majority had voted to fire petitioner, the court permanently enjoined petitioner from entering Church property or interfering in Church affairs.

II

Because religious organizations may own property and enter into contracts, it is inevitable that they will become involved in legal disputes. However, where the use of property or the terms of contracts necessitate reference to ecclesiastical principles or authority, courts must exercise extreme care to avoid taking sides on matters of religious belief. This Court set down the basic framework for such situations over 100 years ago, in *Watson, supra.* Although it has undergone some refinements, see, *e. g., Jones* v. *Wolf,* 443 U. S. 595 (1979), the *Watson* approach is simple. A court may apply neutral principles of secular law to the dispute at hand. When that process requires a court to determine the validity of a church decision, the court ordinarily must discern from the relevant canonical law what body is authorized to make a particular decision within the church, and what decision that body has reached. Having done so, the court may not inquire whether the decision was made arbitrarily or whether it conflicts with the ecclesiastical precepts of the organization. *Serbian Eastern Orthodox Diocese* v. *Milivojevich,* 426 U. S. 696 (1976); *Maryland and Virginia Eldership* v. *Church of God at Sharpsburg, Inc.,* 396 U. S. 367, 368 (1970) (BRENNAN, J., concurring).

In the present case the trial court clearly did not follow this method; indeed it imposed its own view of proper procedures on the congregation's decisionmaking. The court took respondents' word that they represented the Church without any evidence, although petitioner contested the fact. The court made no inquiry into whether the alleged meeting at which petitioner was fired actually took place, whether a quorum was present, or how the members voted. Lacking any evidence that the authorized decisionmaker had acted, the court induced a decision on its own initiative.

This participation in the decisionmaking of an ecclesiastical body is both dangerous and unwarranted. Courts have no business "helping" a religious organization to make its wishes known. The court in this case should have limited its inquiry to the terms of petitioner's employment contract and to whether the Church had taken the actions requisite to terminating that contract. If the authorized body had indeed terminated petitioner's employment, then the court could validly have taken steps to enforce the Church's right to keep petitioner off Church property. Until respondents, who bore the burden of proof, demonstrated that such termination had taken place, the court's only proper response was to do nothing. Because the trial court instead plunged directly into the dispute, heedless of the severe risk of entanglement in religious affairs, I dissent from this Court's denial of certiorari.

No. 85–1477. LUCY, PERSONAL REPRESENTATIVE OF THE ESTATE OF LUCY, ET AL. *v.* AMOCO OIL CO. C. A. 6th Cir. Motions of Concerned Leaders in Government, Education and Business and Service Station Dealers of America, Inc., for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 780 F. 2d 1022.

No. 85–6170. PRESCOTT *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 66 N. Y. 2d 216, 486 N. E. 2d 813.

No. 85–6495. HOLCOMB *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 508 Pa. 425, 498 A. 2d 833.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

Rehearing Denied

No. 83–6950. MAY *v.* KROGER CO. ET AL., 469 U. S. 847; and

No. 84–1538. FISHER ET AL. *v.* CITY OF BERKELEY, CALIFORNIA, ET AL., *ante*, p. 260. Petitions for rehearing denied. JUSTICE BRENNAN took no part in the consideration or decision of these petitions.

No. 85-676. Bock *v.* New York et al., 474 U. S. 996;

No. 85-6001. Dooley *v.* Belcher, *ante*, p. 1002;

No. 85-6002. Dooley *v.* Federal Home Loan Mortgage Corporation et al., *ante*, p. 1002;

No. 85-6100. Kalyon *v.* New York, *ante*, p. 1086;

No. 85-6144. Acuff *v.* Henry et al., *ante*, p. 1042;

No. 85-6150. In re Nelson, *ante*, p. 1044; and

No. 85-6293. McDonald *v.* Tennessee, *ante*, p. 1088. Petitions for rehearing denied.

No. 85-1182. Humble Exploration Co., Inc., et al. *v.* Browning et al., *ante*, p. 1065;

No. 85-1185. Wheaton *v.* City of Oklahoma City et al., *ante*, p. 1062;

No. 85-6186. Tucker et al. *v.* Maschner, Warden, et al., *ante*, p. 1066;

No. 85-6201. Prantil *v.* California, *ante*, p. 1067; and

No. 85-6212. Smiga *v.* Dean Witter Reynolds, Inc., *ante*, p. 1067. Petitions for rehearing denied. Justice Brennan took no part in the consideration or decision of these petitions.

AMENDMENTS TO FEDERAL RULES OF APPELLATE PROCEDURE

The following amendments to the Federal Rules of Appellate Procedure were prescribed by the Supreme Court of the United States on March 10, 1986, pursuant to 18 U. S. C. § 3772 and 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1154. The Judicial Conference Report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2072, such amendments do not take effect until so reported to Congress and until the expiration of 90 days thereafter. Moreover, Congress may defer the effective date to a later date or until approved by Act of Congress, or may modify such amendments.

For earlier publication of the Federal Rules of Appellate Procedure and the amendments thereto, see 389 U. S. 1063, 398 U. S. 971, 401 U. S. 1029, 406 U. S. 1005, and 441 U. S. 973.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

MARCH 10, 1986

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress amendments to the Federal Rules of Appellate Procedure which have been adopted by the Supreme Court pursuant to Title 18, United States Code, Section 3772, and Title 28, United States Code, Section 2072.

Accompanying these rules is an excerpt from the report of the Judicial Conference of the United States containing the Advisory Committee notes submitted to the Court for its consideration pursuant to Title 28, United States Code, Section 331.

Respectfully,

(Signed) WARREN E. BURGER
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

MONDAY, MARCH 10, 1986

ORDERED:

1. That the Federal Rules of Appellate Procedure be, and they hereby are, amended by including therein new Appellate Rules 3.1, 5.1 and 15.1 and amendments to Appellate Rules 3(d), 8(b), 10(b) and (c), 11(b), 12(a), 19, 23(b) and (c), 24(a), 25(a) and (b), 26(a) and (c), 28(c) and (j), 30(a), (b) and (c), 31(a) and (c), 34(a) and (e), 39(c) and (d), 43(a) and (c), 45(a), (b), and (d), and 46(a) and (b), as hereinafter set forth:

[See *infra*, pp. 1157–1174.]

2. That the foregoing additions to and changes in the Federal Rules of Appellate Procedure, shall take effect on July 1, 1986, and shall govern all proceedings in appellate actions thereafter commenced and, insofar as just and practicable, all proceedings in appellate actions then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing additions to and changes in the Rules of Appellate Procedure in accordance with the provisions of Section 3772 of Title 18 and Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Rule 3. Appeal as of right—how taken.

. . . . .

(d) Service of the notice of appeal.—The clerk of the district court shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record of each party other than the appellant, or, if a party is not represented by counsel, to the last known address of that party; and the clerk shall transmit forthwith a copy of the notice of appeal and of the docket entries to the clerk of the court of appeals named in the notice. When an appeal is taken by a defendant in a criminal case, the clerk shall also serve a copy of the notice of appeal upon the defendant, either by personal service or by mail addressed to the defendant. The clerk shall note on each copy served the date on which the notice of appeal was filed. Failure of the clerk to serve notice shall not affect the validity of the appeal. Service shall be sufficient notwithstanding the death of a party or the party's counsel. The clerk shall note in the docket the names of the parties to whom the clerk mails copies, with the date of mailing.

. . . . .

Rule 3.1. Appeals from judgments entered by magistrates in civil cases.

When the parties consent to a trial before a magistrate pursuant to 28 U. S. C. § 636(c)(1), an appeal from a judgment entered upon the direction of a magistrate shall be heard by the court of appeals pursuant to 28 U. S. C. § 636(c)(3), unless the parties, in accordance with 28 U. S. C. § 636(c)(4), consent to an appeal on the record to a judge of the district court and thereafter, by petition only, to the court of appeals. Appeals to the court of appeals pursuant to 28 U. S. C. § 636 (c)(3) shall be taken in identical fashion as appeals from other judgments of the district court.

Rule 5.1. Appeals by permission under 28 U. S. C. § 636(c)(5).

(a) Petition for leave to appeal; answer or cross petition.—An appeal from a district court judgment, entered after an appeal pursuant to 28 U. S. C. § 636(c)(4) to a judge of the district court from a judgment entered upon direction of a magistrate in a civil case, may be sought by filing a petition for leave to appeal. An appeal on petition for leave to appeal is not a matter of right, but its allowance is a matter of sound judicial discretion. The petition shall be filed with the clerk of the court of appeals within the time provided by Rule 4(a) for filing a notice of appeal, with proof of service on all parties to the action in the district court. A notice of appeal need not be filed. Within 14 days after service of the petition, a party may file an answer in opposition or a cross petition.

(b) Content of petition; answer.—The petition for leave to appeal shall contain a statement of the facts necessary to an understanding of the questions to be presented by the appeal; a statement of those questions and of the relief sought; a statement of the reasons why in the opinion of the petitioner the appeal should be allowed; and a copy of the order, decree or judgment complained of and any opinion or memorandum relating thereto. The petition and answer shall be submitted to a panel of judges of the court of appeals without oral argument unless otherwise ordered.

(c) Form of papers; number of copies.—All papers may be typewritten. Three copies shall be filed with the original, but the court may require that additional copies be furnished.

(d) Allowance of the appeal; fees; cost bond; filing of record.—Within 10 days after the entry of an order granting the appeal, the appellant shall (1) pay to the clerk of the district court the fees established by statute and the docket fee prescribed by the Judicial Conference of the United States and (2) file a bond for costs if required pursuant to Rule 7.

The clerk of the district court shall notify the clerk of the court of appeals of the payment of the fees. Upon receipt of such notice, the clerk of the court of appeals shall enter the appeal upon the docket. The record shall be transmitted and filed in accordance with Rules 11 and 12(b).

Rule 8. Stay or injunction pending appeal.

. . . . .

(b) Stay may be conditioned upon giving of bond; proceedings against sureties.—Relief available in the court of appeals under this rule may be conditioned upon the filing of a bond or other appropriate security in the district court. If security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the district court and irrevocably appoints the clerk of the district court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. A surety's liability may be enforced on motion in the district court without the necessity of an independent action. The motion and such notice of the motion as the district court prescribes may be served on the clerk of the district court, who shall forthwith mail copies to the sureties if their addresses are known.

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Rule 10. The record on appeal.

. . . . .

(b) The transcript of proceedings; duty of appellant to order; notice to appellee if partial transcript is ordered.

(1) Within 10 days after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as the appellant deems necessary, subject to local rules of the courts of appeals. The order shall be in writing and within the same period a copy shall be filed with the clerk of the district court. If funding is to come from the United States under the Criminal Justice Act, the order shall so state. If no such parts of

the proceedings are to be ordered, within the same period the appellant shall file a certificate to that effect.

(2) If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.

(3) Unless the entire transcript is to be included, the appellant shall, within the 10 days time provided in (b)(1) of this Rule 10, file a statement of the issues the appellant intends to present on the appeal and shall serve on the appellee a copy of the order or certificate and of the statement. If the appellee deems a transcript or other parts of the proceedings to be necessary, the appellee shall, within 10 days after the service of the order or certificate and the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. Unless within 10 days after service of such designation the appellant has ordered such parts, and has so notified the appellee, the appellee may within the following 10 days either order the parts or move in the district court for an order requiring the appellant to do so.

(4) At the time of ordering, a party must make satisfactory arrangements with the reporter for payment of the cost of the transcript.

(c) Statement on the evidence or proceedings when no report was made or when the transcript is unavailable.—If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee, who may serve objections or proposed amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal.

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Rule 11. Transmission of the record.

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(b) Duty of reporter to prepare and file transcript; notice to court of appeals; duty of clerk to transmit the record.—Upon receipt of an order for a transcript, the reporter shall acknowledge at the foot of the order the fact that the reporter has received it and the date on which the reporter expects to have the transcript completed and shall transmit the order, so endorsed, to the clerk of the court of appeals. If the transcript cannot be completed within 30 days of receipt of the order the reporter shall request an extension of time from the clerk of the court of appeals and the action of the clerk of the court of appeals shall be entered on the docket and the parties notified. In the event of the failure of the reporter to file the transcript within the time allowed, the clerk of the court of appeals shall notify the district judge and take such other steps as may be directed by the court of appeals. Upon completion of the transcript the reporter shall file it with the clerk of the district court and shall notify the clerk of the court of appeals that the reporter has done so.

When the record is complete for purposes of the appeal, the clerk of the district court shall transmit it forthwith to the clerk of the court of appeals. The clerk of the district court shall number the documents comprising the record and shall transmit with the record a list of documents correspondingly numbered and identified with reasonable definiteness. Documents of unusual bulk or weight, physical exhibits other than documents, and such other parts of the record as the court of appeals may designate by local rule, shall not be transmitted by the clerk unless the clerk is directed to do so by a party or by the clerk of the court of appeals. A party must make advance arrangements with the clerks for the transportation and receipt of exhibits of unusual bulk or weight.

. . . . .

Rule 12. Docketing the appeal; filing of the record.

(a) Docketing the appeal.—Upon receipt of the copy of the notice of appeal and of the docket entries, transmitted by the clerk of the district court pursuant to Rule 3(d), the clerk of the court of appeals shall thereupon enter the appeal upon the docket. An appeal shall be docketed under the title given to the action in the district court, with the appellant identified as such, but if such title does not contain the name of the appellant, the appellant's name, identified as appellant, shall be added to the title.

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Rule 15.1. Briefs and oral argument in national labor relations board proceedings.

Each party adverse to the National Labor Relations Board in an enforcement or a review proceeding shall proceed first on briefing and at oral argument unless the court orders otherwise.

Rule 19. Settlement of judgments enforcing orders.

When an opinion of the court is filed directing the entry of a judgment enforcing in part the order of an agency, the agency shall within 14 days thereafter serve upon the respondent and file with the clerk a proposed judgment in conformity with the opinion. If the respondent objects to the proposed judgment as not in conformity with the opinion, the respondent shall within 7 days thereafter serve upon the agency and file with the clerk a proposed judgment which the respondent deems to be in conformity with the opinion. The court will thereupon settle the judgment and direct its entry without further hearing or argument.

Rule 23. Custody of prisoners in habeas corpus proceedings.

. . . . .

(b) Detention or release of prisoner pending review of decision failing to release.—Pending review of a decision failing or refusing to release a prisoner in such a proceeding, the

prisoner may be detained in the custody from which release is sought, or in other appropriate custody, or may be enlarged upon the prisoner's recognizance, with or without surety, as may appear fitting to the court or justice or judge rendering the decision, or to the court of appeals or to the Supreme Court, or to a judge or justice of either court.

(c) Release of prisoner pending review of decision ordering release.—Pending review of a decision ordering the release of a prisoner in such a proceeding, the prisoner shall be enlarged upon the prisoner's recognizance, with or without surety, unless the court or justice or judge rendering the decision, or the court of appeals or the Supreme Court, or a judge or justice of either court shall otherwise order.

. . . . .

Rule 24. Proceedings in forma pauperis.

(a) Leave to proceed on appeal in forma pauperis from district court to court of appeals.—A party to an action in a district court who desires to proceed on appeal in forma pauperis shall file in the district court a motion for leave so to proceed, together with an affidavit, showing, in the detail prescribed by Form 4 of the Appendix of Forms, the party's inability to pay fees and costs or to give security therefor, the party's belief that that party is entitled to redress, and a statement of the issues which that party intends to present on appeal. If the motion is granted, the party may proceed without further application to the court of appeals and without prepayment of fees or costs in either court or the giving of security therefor. If the motion is denied, the district court shall state in writing the reasons for the denial.

Notwithstanding the provisions of the preceding paragraph, a party who has been permitted to proceed in an action in the district court in forma pauperis, or who has been permitted to proceed there as one who is financially unable to obtain adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization unless, before or after the notice of appeal is filed, the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled so to proceed, in which event the district court shall state in writing the reasons for such certification or finding.

If a motion for leave to proceed on appeal in forma pauperis is denied by the district court, or if the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled to proceed in forma pauperis, the clerk shall forthwith serve notice of such action. A motion for leave so to proceed may be filed in the court of appeals within 30 days after service of notice of the action of the district court. The motion shall be accompanied by a copy of the affidavit filed in the district court, or by the affidavit prescribed by the first paragraph of this subdivision if no affidavit has been filed in the district court, and by a copy of the statement of reasons given by the district court for its action.

. . . . .

Rule 25. Filing and service.

(a) Filing.—Papers required or permitted to be filed in a court of appeals shall be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing shall not be timely unless the papers are received by the clerk within the time fixed for filing, except that briefs and appendices shall be deemed filed on the day of mailing if the most expeditious form of delivery by mail, excepting special delivery, is utilized. If a motion requests relief which may be granted by a single judge, the judge may permit the motion to be filed with the judge, in which event the judge shall note thereon the date of filing and shall thereafter transmit it to the clerk.

(b) Service of all papers required.—Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served by a party or person acting for that party on all other parties to the appeal or review. Service on a party represented by counsel shall be made on counsel.

. . . . .

Rule 26. Computation and extension of time.

(a) Computation of time.—In computing any period of time prescribed by these rules, by an order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period extends until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States. It shall also include a day appointed as a holiday by the state wherein the district court which rendered the judgment or order which is or may be appealed from is situated, or by the state wherein the principal office of the clerk of the court of appeals in which the appeal is pending is located.

. . . . .

(c) Additional time after service by mail.—Whenever a party is required or permitted to do an act within a prescribed period after service of a paper upon that party and the paper is served by mail, 3 days shall be added to the prescribed period.

Rule 28. Briefs.

. . . . .

(c) Reply brief.—The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross

appeal. No further briefs may be filed except with leave of court. All reply briefs shall contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the reply brief where they are cited.

. . . . .

(j) Citation of supplemental authorities.—When pertinent and significant authorities come to the attention of a party after the party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the court, by letter, with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited.

Rule 30. Appendix to the briefs.

(a) Duty of appellant to prepare and file; content of appendix; time for filing; number of copies.—The appellant shall prepare and file an appendix to the briefs which shall contain: (1) the relevant docket entries in the proceeding below; (2) any relevant portions of the pleadings, charge, findings or opinion; (3) the judgment, order or decision in question; and (4) any other parts of the record to which the parties wish to direct the particular attention of the court. Except where they have independent relevance, memoranda of law in the district court should not be included in the appendix. The fact that parts of the record are not included in the appendix shall not prevent the parties or the court from relying on such parts.

Unless filing is to be deferred pursuant to the provisions of subdivision (c) of this rule, the appellant shall serve and file the appendix with the brief. Ten copies of the appendix shall be filed with the clerk, and one copy shall be served on counsel for each party separately represented, unless the court shall by rule or order direct the filing or service of a lesser number.

(b) Determination of contents of appendix; cost of producing.—The parties are encouraged to agree as to the contents of the appendix. In the absence of agreement, the appellant shall, not later than 10 days after the date on which the record is filed, serve on the appellee a designation of the parts of the record which the appellant intends to include in the appendix and a statement of the issues which the appellant intends to present for review. If the appellee deems it necessary to direct the particular attention of the court to parts of the record not designated by the appellant, the appellee shall, within 10 days after receipt of the designation, serve upon the appellant a designation of those parts. The appellant shall include in the appendix the parts thus designated. In designating parts of the record for inclusion in the appendix, the parties shall have regard for the fact that the entire record is always available to the court for reference and examination and shall not engage in unnecessary designation.

Unless the parties otherwise agree, the cost of producing the appendix shall initially be paid by the appellant, but if the appellant considers that parts of the record designated by the appellee for inclusion are unnecessary for the determination of the issues presented the appellant may so advise the appellee and the appellee shall advance the cost of including such parts. The cost of producing the appendix shall be taxed as costs in the case, but if either party shall cause matters to be included in the appendix unnecessarily the court may impose the cost of producing such parts on the party. Each circuit shall provide by local rule for the imposition of sanctions against attorneys who unreasonably and vexatiously increase the costs of litigation through the inclusion of unnecessary material in the appendix.

(c) Alternative method of designating contents of the appendix; how references to the record may be made in the briefs when alternative method is used.—If the court shall so provide by rule for classes of cases or by order in specific cases, preparation of the appendix may be deferred until after the briefs have been filed, and the appendix may be

filed 21 days after service of the brief of the appellee. If the preparation and filing of the appendix is thus deferred, the provisions of subdivision (b) of this Rule 30 shall apply, except that the designations referred to therein shall be made by each party at the time each brief is served, and a statement of the issues presented shall be unnecessary.

If the deferred appendix authorized by this subdivision is employed, references in the briefs to the record may be to the pages of the parts of the record involved, in which event the original paging of each part of the record shall be indicated in the appendix by placing in brackets the number of each page at the place in the appendix where that page begins. Or if a party desires to refer in a brief directly to pages of the appendix, that party may serve and file typewritten or page proof copies of the brief within the time required by Rule 31(a), with appropriate references to the pages of the parts of the record involved. In that event, within 14 days after the appendix is filed the party shall serve and file copies of the brief in the form prescribed by Rule 32(a) containing references to the pages of the appendix in place of or in addition to the initial references to the pages of the parts of the record involved. No other changes may be made in the brief as initially served and filed, except that typographical errors may be corrected.

. . . . .

Rule 31. Filing and service of briefs.

(a) Time for serving and filing briefs.—The appellant shall serve and file a brief within 40 days after the date on which the record is filed. The appellee shall serve and file a brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee, but, except for good cause shown, a reply brief must be filed at least 3 days before argument. If a court of appeals is prepared to consider cases on the merits promptly after briefs are filed, and its practice is to do so, it may shorten the periods prescribed above for

serving and filing briefs, either by rule for all cases or for classes of cases, or by order for specific cases.

. . . . .

(c) Consequence of failure to file briefs.—If an appellant fails to file a brief within the time provided by this rule, or within the time as extended, an appellee may move for dismissal of the appeal. If an appellee fails to file a brief, the appellee will not be heard at oral argument except by permission of the court.

Rule 34. Oral argument.

(a) In general; local rule.—Oral argument shall be allowed in all cases unless pursuant to local rule a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed. Any such local rule shall provide any party with an opportunity to file a statement setting forth the reasons why oral argument should be heard. A general statement of the criteria employed in the administration of such local rule shall be published in or with the rule and such criteria shall conform substantially to the following minimum standard:

Oral Argument will be allowed unless

(1) the appeal is frivolous; or

(2) the dispositive issue or set of issues has been recently authoritatively decided; or

(3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

. . . . .

(e) Non-appearance of parties.—If the appellee fails to appear to present argument, the court will hear argument on behalf of the appellant, if present. If the appellant fails to appear, the court may hear argument on behalf of the appellee, if present. If neither party appears, the case will be decided on the briefs unless the court shall otherwise order.

. . . . .

Rule 39. Costs.

. . . . .

(c) Costs of briefs, appendices, and copies of records.—By local rule the court of appeals shall fix the maximum rate at which the cost of printing or otherwise producing necessary copies of briefs, appendices, and copies of records authorized by Rule 30(f) shall be taxable. Such rate shall not be higher than that generally charged for such work in the area where the clerk's office is located and shall encourage the use of economical methods of printing and copying.

(d) Bill of costs; objections; costs to be inserted in mandate or added later.—A party who desires such costs to be taxed shall state them in an itemized and verified bill of costs which the party shall file with the clerk, with proof of service, within 14 days after the entry of judgment. Objections to the bill of costs must be filed within 10 days of service on the party against whom costs are to be taxed unless the time is extended by the court. The clerk shall prepare and certify an itemized statement of costs taxed in the court of appeals for insertion in the mandate, but the issuance of the mandate shall not be delayed for taxation of costs and if the mandate has been issued before final determination of costs, the statement, or any amendment thereof, shall be added to the mandate upon request by the clerk of the court of appeals to the clerk of the district court.

. . . . .

Rule 43. Substitution of parties.

(a) Death of a party.—If a party dies after a notice of appeal is filed or while a proceeding is otherwise pending in the court of appeals, the personal representative of the deceased party may be substituted as a party on motion filed by the representative or by any party with the clerk of the court of appeals. The motion of a party shall be served upon the representative in accordance with the provisions of Rule 25. If the deceased party has no representative, any party may suggest the death on the record and proceedings shall then be

had as the court of appeals may direct. If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court but before a notice of appeal is filed, an appellant may proceed as if death had not occurred. After the notice of appeal is filed substitution shall be effected in the court of appeals in accordance with this subdivision. If a party entitled to appeal shall die before filing a notice of appeal, the notice of appeal may be filed by that party's personal representative, or, if there is no personal representative by that party's attorney of record within the time prescribed by these rules. After the notice of appeal is filed substitution shall be effected in the court of appeals in accordance with this subdivision.

* * * * *

(c) Public officers; death or separation from office.

(1) When a public officer is a party to an appeal or other proceeding in the court of appeals in an official capacity and during its pendency dies, resigns or otherwise ceases to hold office, the action does not abate and the public officer's successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) When a public officer is a party to an appeal or other proceeding in an official capacity that public officer may be described as a party by the public officer's official title rather than by name; but the court may require the public officer's name to be added.

Rule 45. Duties of clerks.

(a) General provisions.—The clerk of a court of appeals shall take the oath and give the bond required by law. Neither the clerk nor any deputy clerk shall practice as an attorney or counselor in any court while continuing in office. The court of appeals shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process

and of making motions and orders. The office of the clerk with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but a court may provide by local rule or order that the office of its clerk shall be open for specified hours on Saturdays or on particular legal holidays other than New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day.

(b) The docket; calendar; other records required.—The clerk shall maintain a docket in such form as may be prescribed by the Director of the Administrative Office of the United States Courts. The clerk shall enter a record of all papers filed with the clerk and all process, orders and judgments. An index of cases contained in the docket shall be maintained as prescribed by the Director of the Administrative Office of the United States Courts.

The clerk shall prepare, under the direction of the court, a calendar of cases awaiting argument. In placing cases on the calendar for argument, the clerk shall give preference to appeals in criminal cases and to appeals and other proceedings entitled to preference by law.

The clerk shall keep such other books and records as may be required from time to time by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, or as may be required by the court.

• • • • •

(d) Custody of records and papers.—The clerk shall have custody of the records and papers of the court. The clerk shall not permit any original record or paper to be taken from the clerk's custody except as authorized by the orders or instructions of the court. Original papers transmitted as the record on appeal or review shall upon disposition of the case be returned to the court or agency from which they were re-

ceived. The clerk shall preserve copies of briefs and appendices and other printed papers filed.

Rule 46. Attorneys.

(a) Admission to the bar of a court of appeals; eligibility; procedure for admission.—An attorney who has been admitted to practice before the Supreme Court of the United States, or the highest court of a state, or another United States court of appeals, or a United States district court (including the district courts for the Canal Zone, Guam and the Virgin Islands), and who is of good moral and professional character, is eligible for admission to the bar of a court of appeals.

An applicant shall file with the clerk of the court of appeals, on a form approved by the court and furnished by the clerk, an application for admission containing the applicant's personal statement showing eligibility for membership. At the foot of the application the applicant shall take and subscribe to the following oath or affirmation:

I, ______________________, do solemnly swear (or affirm) that I will demean myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States.

Thereafter, upon written or oral motion of a member of the bar of the court, the court will act upon the application. An applicant may be admitted by oral motion in open court, but it is not necessary that the applicant appear before the court for the purpose of being admitted, unless the court shall otherwise order. An applicant shall upon admission pay to the clerk the fee prescribed by rule or order of the court.

(b) Suspension or disbarment.—When it is shown to the court that any member of its bar has been suspended or disbarred from practice in any other court of record, or has been guilty of conduct unbecoming a member of the bar of the court, the member will be subject to suspension or disbarment by the court. The member shall be afforded an opportunity to show good cause, within such time as the court shall prescribe, why the member should not be suspended or dis-

barred. Upon the member's response to the rule to show cause, and after hearing, if requested, or upon expiration of the time prescribed for a response if no response is made, the court shall enter an appropriate order.

REPORTER'S NOTE

The next page is purposely numbered 1301. The numbers between 1174 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

CALIFORNIA *v.* BROWN

ON APPLICATION FOR STAY

No. A–699. Decided March 27, 1986

California's application to stay the enforcement of the California Supreme Court's judgment—which invalidated respondent's death sentence for first-degree murder on the ground that the Eighth Amendment to the Federal Constitution was violated by a jury instruction given during the sentencing phase of his trial that told the jury not to be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling"—is granted pending disposition of the State's petition for certiorari. It is likely that four Members of this Court will vote to grant certiorari to review the jury-instruction issue, and that the decision below ultimately will be reversed. There is no merit to respondent's argument that the decision below was based on adequate and independent state grounds, and is therefore unreviewable by this Court. Moreover, the State has met its burden of demonstrating irreparable harm if its application for a stay is not granted.

JUSTICE REHNQUIST, Circuit Justice.

Applicant, the State of California, asks that I stay pending disposition of its petition for certiorari the enforcement of the judgment of the California Supreme Court, which invalidated the death sentence imposed on respondent Brown in 1980 for the first-degree murder of a 15-year-old girl. See 40 Cal. 3d 512, 709 P. 2d 440 (1986). The California Supreme Court invalidated Brown's death sentence because it believed that a jury instruction given during the sentencing phase of Brown's trial, which told the jury that it "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling," violated the Eighth

Amendment to the United States Constitution. The court felt that this instruction was incompatible with our decisions in *Lockett* v. *Ohio*, 438 U. S. 586 (1978), and *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), which construed the Eighth Amendment to require that the sentencer in a capital case be allowed to consider, "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.*, at 110, quoting *Lockett*, *supra*, at 604.

I think it is likely that four Members of this Court would vote to grant certiorari to review the California Supreme Court's holding that the jury instruction at issue in this case violated Brown's Eighth Amendment rights under *Lockett* and *Eddings*, and that the decision below ultimately would be reversed. The California death penalty statute in effect at the time of Brown's trial expressly permitted Brown to introduce evidence, at sentencing, "as to any matter relevant to . . . mitigation . . . including, but not limited to, the nature and circumstances of the present offense, . . . and the defendant's character, background, history, mental condition and physical condition." Cal. Penal Code Ann. § 190.3 (West Supp. 1986). The California statute also provided:

> "In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:
>
> "(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true . . . .
>
> "(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
>
> "(c) The presence or absence of any prior felony conviction.

> "(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> "(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
>
> "(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.
>
> "(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.
>
> "(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects *[sic]* of intoxication.
>
> "(i) The age of the defendant at the time of the crime.
>
> "(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.
>
> "(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." *Ibid.*

A portion of the jury instructions given at the sentencing phase of Brown's trial tracked the above statutory language, thus clearly informing the jury of its constitutional duty to consider in mitigation all relevant aspects of the defendant's character and the circumstances of his crime. See California Jury Instructions–Criminal No. 8.84.1 (4th ed. 1979). In my view a strong argument can be made that these statutory provisions, and the instructions which explained them to Brown's sentencing jury, fully complied with the dictates of *Lockett* and *Eddings*.[1]

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[1] In *California* v. *Ramos*, 463 U. S. 992 (1983), we cited these very same provisions of the California statute and noted:

The jury instruction held by the California Supreme Court in this case to be unconstitutional was in no way inconsistent with the aforementioned statutory provisions. Nor did the instruction tell the jury to ignore any relevant evidence or mitigating circumstances. On the contrary, it simply told the jury not to be swayed by "*mere* sentiment, conjecture," and the like. Such an instruction focuses the jury's attention on the evidence and the reasonable inferences to be drawn therefrom. It is consistent with JUSTICE STEVENS' observation in *Gardner* v. *Florida*, 430 U. S. 349 (1977), that "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Id.*, at 358.[2]

Brown argues that the decision below was based on adequate and independent state grounds, and is therefore unreviewable by this Court. It is true that, prior to this Court's 1972 decision in *Furman* v. *Georgia*, 408 U. S. 238 (1972), the California Supreme Court had held that a jury instruction identical to the one at issue in this case violated the State Constitution. See *People* v. *Bandhauer*, 1 Cal. 3d 609, 618–619, 463 P. 2d 408, 416 (1970). After this Court's 1976 decision in *Gregg* v. *Georgia*, 428 U. S. 153, however, the

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"[R]espondent does not, and indeed could not, contend that the California sentencing scheme violates the directive of *Lockett* v. *Ohio*, 438 U. S. 586 (1978). The California statute in question permits the defendant to present any evidence to show that a penalty less than death is appropriate in his case." *Id.*, at 1005, n. 19.

[2] Moreover, in practical terms, I would expect the instruction at issue to generally *help* capital defendants, by reducing the possibility that sentencing juries will be swayed by sympathy *for the victim*, along with other adverse forms of "passion, prejudice, public opinion or public feeling." See *People* v. *Easley*, 34 Cal. 3d 858, 886, 671 P. 2d 813, 831 (1983) (Mosk, J., dissenting) ("In the current climate of public opinion, sympathy is more likely to be aroused for the victim and his family than for a defendant who has been found guilty of a brutal first degree murder. Thus cautioning a jury in the penalty phase of the trial not to be swayed by mere sympathy redounds to the benefit, not the detriment, of the defendant").

California Supreme Court revisited the question, treating it as a matter of federal, not state, constitutional law. See *People* v. *Robertson*, 33 Cal. 3d 21, 56–59, 655 P. 2d 279, 286–287 (1982). In *People* v. *Easley*, 34 Cal. 3d 858, 671 P. 2d 813 (1983), the court explained that "the federal cases following *Furman* and *Gregg* do not undermine [the prior] line of California authority, but, on the contrary, establish that these decisions *are compelled as a matter of federal constitutional law.*" *Id.*, at 876, 671 P. 2d, at 824 (emphasis added); see also *People* v. *Lanphear*, 36 Cal. 3d 163, 164, 680 P. 2d 1081, 1082 (1984) ("federal constitutional law forbids" the instruction at issue in this case). Finally, in the instant case, the court did not cite the State Constitution at all, but stated that it was relying on "the individualized sentencing concerns inherent in the Eighth Amendment." 40 Cal. 3d, at 537, 709 P. 2d, at 453. Thus, it seems that this case is one in which, "'at the very least, the [state] court felt compelled by what it understood to be federal constitutional considerations to construe . . . its own law in the manner it did.'" *Delaware* v. *Prouse*, 440 U. S. 648, 653 (1979), quoting *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U. S. 562, 568 (1977). As such, we have jurisdiction to review the California Supreme Court's decision. "If the state court misapprehended federal law, '[i]t should be freed to decide . . . these suits according to its own local law.'" *Delaware* v. *Prouse*, *supra*, at 653, quoting *Missouri ex rel. Southern R. Co.* v. *Mayfield*, 340 U. S. 1, 5 (1950).

I also think the State has met its burden of demonstrating irreparable harm if its application for a stay is not granted. The California Supreme Court denied the State's application for a stay of issuance of its remittitur, and for an order deferring enforcement of its judgment, and issued the remittitur to the California Superior Court for Riverside County on January 30, 1986. The remittitur was filed by the Superior Court on February 3. Under California law, if the State does not hold a new trial on the issue of Brown's penalty within 60 days of the filing of the remittitur, or by April 4, it will be forever barred from seeking the death penalty in the instant case. See Cal. Penal Code Ann. § 1382(2) (West 1982). On the other hand, since the California Supreme Court affirmed Brown's murder conviction, his status will be unaffected by the issuance of a stay pending disposition of the State's petition for certiorari. Accordingly, I grant the State's application for a stay.[3]

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[3] The State's petition for certiorari also asks this Court to review a portion of the California Supreme Court's opinion in which it placed a new construction on certain portions of the California death penalty statute in order to avoid what it perceived to be a potential Eighth Amendment problem. See 40 Cal. 3d 512, 538–545, 709 P. 2d 440, 453–459 (1985). I express no view on whether this Court would be likely to grant certiorari on this issue, which was not relied upon by the California Supreme Court as an alternative basis for invalidating Brown's death sentence.

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ARBITRATION—Continued.

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CIVIL RIGHTS ACT OF 1871—Continued.
had violated his rights under Fourth and Fourteenth Amendments, claim against county was improperly dismissed since county policymaker ordered, as a matter of "official policy," action that was taken by Deputies. Pembaur v. Cincinnati, p. 469.

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COASTLINE. See **Federal-State Relations.**

CO-CONSPIRATOR'S STATEMENTS' ADMISSIBILITY AGAINST DEFENDANT. See **Constitutional Law, I, 1.**

COLLECTIVE-BARGAINING AGREEMENTS. See **Arbitration.**

COMMERCE CLAUSE. See **National Labor Relations Act, 3.**

COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980.

Hazardous substance releases—Cleanup costs—Damage to third parties—Pre-emption of state law.—Section 114(c) of Act—which provides that no person may be required to contribute to any fund to compensate for claims for any costs or damages or claims which may be compensated under Act—pre-empted New Jersey Act that imposed excise tax upon petroleum and chemical facilities in State to create fund to pay, *inter alia*, for State's or third parties' cleaning up hazardous substance releases; however, state Act was not pre-empted as to use of state fund to compensate third parties for damage resulting from hazardous substance discharges, to pay personnel and equipment costs, to administer fund, and to conduct research. Exxon Corp. v. Hunt, p. 355.

CONFESSIONS. See **Constitutional Law, VIII, 1.**

CONFRONTATION CLAUSE. See **Constitutional Law, I.**

CONSPIRACY BY JAPANESE FIRMS TO FIX TELEVISION SET PRICES. See **Antitrust Acts, 1.**

CONSTITUTIONAL LAW. See also **Antitrust Acts, 2; Civil Rights Act of 1871; Jurisdiction; National Labor Relations Act, 3; Statutes of Limitations.**

I. Confrontation of Witnesses.

1. *Co-conspirator's statements—Admissibility.*—Confrontation Clause does not require a showing of co-conspirator's unavailability as a condition to admission in evidence against defendant of co-conspirator's out-of-court statements. United States v. Inadi, p. 387.

2. *Cross-examination of prosecution witness—Harmless error.*—Where trial court at respondent's murder trial refused to allow cross-examination of a prosecution witness about an agreement that he had made to speak with prosecutor concerning murder in question in exchange for dismissal of an unrelated criminal charge against him, court's denial of opportunity to impeach witness for bias violated respondent's rights under Confrontation Clause; however, such ruling was subject to harmless-error analysis. Delaware v. Van Arsdall, p. 673.

CONSTITUTIONAL LAW—Continued.

II. Cruel and Unusual Punishment.

Prison riot—Officer's wounding of inmate.—Where (1) during a riot in a state prison, respondent inmate was shot in knee by a prison officer pursuant to instructions of prison security manager when respondent sought to follow manager up stairs that manager was using in an attempt to free a hostage, and (2) respondent brought suit against prison officials under 42 U. S. C. § 1983, shooting of respondent did not violate Cruel and Unusual Punishments Clause of Eighth Amendment; Due Process Clause could not serve as an alternative basis for recovery, independently of Eighth Amendment. Whitley v. Albers, p. 312.

III. Double Jeopardy.

Improper conviction for aggravated murder—Reduction to conviction for murder.—Where (1) after respondent and another man robbed a bank, they were chased by police and ultimately surrounded in a farmhouse, (2) police heard shots in house, respondent emerged and surrendered, and accomplice was found dead inside, (3) after death was ruled to be a suicide, respondent pleaded guilty in state court to aggravated robbery and later admitted having shot accomplice, (4) over respondent's double jeopardy objection, he was then tried for and convicted of aggravated murder based on bank robbery, but (5) state appellate court held that Double Jeopardy Clause barred conviction for aggravated murder and modified conviction to lesser included offense of murder, reducing respondent's concededly jeopardy-barred conviction for aggravated murder to conviction for murder that concededly was not jeopardy barred was an adequate remedy for double jeopardy violation. Morris v. Mathews, p. 237.

IV. Due Process.

1. *Criminal sentence—Judge's imposition after retrial.*—Where (1) after respondent was convicted of murder, he elected, under state law, to be sentenced by jury, which imposed a 20-year sentence, (2) trial judge, because of prosecutorial misconduct, granted a new trial, which resulted in respondent's being convicted again, (3) he then elected to be sentenced by trial judge, who imposed a 50-year sentence, and (4) to justify longer sentence, judge entered findings of fact as to additional evidence received at second trial, Due Process Clause was not violated by judge's imposition of greater sentence on retrial. Texas v. McCullough, p. 134.

2. *Insurer's liability for failure to pay claims—Disqualification of judges.*—Where (1) in a state-court action, appellant insurer was found liable for punitive damages for its alleged bad-faith refusal to pay a valid claim, (2) Alabama Supreme Court affirmed in a *per curiam* opinion written by a justice who, while appeal was pending (as appellant discovered while its application for rehearing was pending), had filed two state-court

CONSTITUTIONAL LAW—Continued.

actions against insurance companies alleging bad-faith failure to pay claims and seeking punitive damages, (3) one of such actions was a class action representing a class that included all justices of Alabama Supreme Court, (4) appellant filed motions challenging opinion writer's participation in *per curiam* decision and his continued participation in considering rehearing application, and also alleging that all justices on court should recuse themselves because of their potential class membership, and (5) motions and rehearing application were denied, opinion writer's participation in instant action violated appellant's due process rights, but other justices were not disqualified under Due Process Clause. Aetna Life Ins. Co. v. Lavoie, p. 813.

V. Freedom of Association.

Union dues—Nonmembers' fees.—First Amendment freedom of association and expression rights of nonunion employees, who were required to pay only portion of union dues attributable to union's collective-bargaining and contract-administration costs and not to union's ideological activities, were violated by union's procedures for considering nonmembers' objections as to union's determination of proper "proportionate share payments." Teachers v. Hudson, p. 292.

VI. Freedom of Religion.

Air Force headgear regulation—Yarmulkes.—First Amendment did not prohibit application of Air Force headgear regulation to prevent an ordained rabbi from wearing a yarmulke while on duty and in uniform as a commissioned officer, even though effect was to restrict wearing of headgear required by his religious beliefs. Goldman v. Weinberger, p. 503.

VII. Freedom of Speech.

1. *Adult theaters' location—Validity of ordinance.*—First Amendment was not violated by a city ordinance prohibiting adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. Renton v. Playtime Theatres, Inc., p. 41.

2. *Defamation action—Burden of proof.*—In view of constitutional protection of true speech, in a defamation action where a newspaper publishes speech of public concern about a private figure, private-figure plaintiff cannot recover damages without showing that challenged statements are false; thus, in their state-court defamation action arising from newspaper articles stating that appellees, a franchisor and its franchisees, had links to organized crime and used them to influence governmental processes, appellees had to prove falsity. Philadelphia Newspapers, Inc. v. Hepps, p. 767.

3. *Obscene movies—Probable-cause standard for search warrant.*—Where (1) an investigator viewed videocassette movies rented from

CONSTITUTIONAL LAW—Continued.

respondent's store, (2) investigator's affidavits summarizing each movie were attached to an application for a warrant to search store and seize such movies, and (3) a state-court judge issued warrant and movies were seized, movies were improperly suppressed at respondent's trial for violating State's obscenity statute since First Amendment does not require a "higher" probable-cause standard for warrants to seize allegedly obscene matters than for warrants to seize such things as weapons or drugs. New York v. P. J. Video, Inc., p. 868.

4. *Public utility—Billing envelope—Enclosure of newsletter.*—Where (1) appellant public utility distributed in its monthly billing envelopes a newsletter that included political editorials, stories on matters of public interest, energy conservation tips, and information about utility services and bills, and (2) appellee California Public Utilities Commission, in ratemaking proceedings, concluded that "extra space" in envelopes was ratepayers' property and that appellee private organization could use "extra space" four times a year to raise funds and communicate with ratepayers, Commission's decision is vacated as violative of First Amendment. Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal., p. 1.

VIII. Right to Counsel.

1. *Assertion of right at arraignment—Subsequent police interrogation.*—Where (1) respondents requested appointment of counsel at their separate arraignments on unrelated murder charges, (2) before they could consult with counsel, police advised them of their *Miranda* rights, questioned them, and obtained their confessions, and (3) they were convicted at their separate trials after their confessions were admitted over their objections, confessions should have been suppressed as violative of Sixth Amendment right to counsel. Michigan v. Jackson, p. 625.

2. *Perjury—Counsel's refusal to cooperate.*—A criminal defendant's Sixth Amendment right to effective assistance of counsel is not violated when an attorney refuses to cooperate with defendant in presenting perjured testimony at his criminal trial, such as respondent's counsel's threatening to withdraw from representation and to inform court if respondent insisted on committing perjury in his testimony at his murder trial as to defense of self-defense. Nix v. Whiteside, p. 157.

3. *Police interrogation—Questioning about murder after arrest for breaking and entering.*—Where (1) after respondent was arrested by Cranston, R. I., police for breaking and entering, police notified Providence police, who went to Cranston on same evening to question respondent about a murder, (2) on same evening, unknown to respondent, his sister, who was unaware that he was suspected of murder, contacted Public Defender's Office, (3) an Assistant Public Defender telephoned Cranston police and informed them that she would represent respondent, and was

CONSTITUTIONAL LAW—Continued.

told that he would not be questioned until next day, (4) on same evening, however, Providence police obtained written confessions to murder from respondent, who waived his *Miranda* rights and who was still unaware of his sister's actions or of attorney's call, and (5) defendant was convicted of murder after trial at which his confessions were admitted, *Miranda*'s Fifth Amendment principles as to right to attorney's presence and right to remain silent were not violated in view of respondent's waivers; nor did police violate Sixth Amendment right to counsel or due process guarantee of fundamental fairness. Moran v. Burbine, p. 412.

IX. Right to Fair Trial.

Uniformed troopers' presence in courtroom.—Uniformed troopers' presence, to supplement usual courtroom security force, at state trial of respondent and others for armed robbery was not so inherently prejudicial that respondent was thereby denied his constitutional right to a fair trial. Holbrook v. Flynn, p. 560.

X. Searches and Seizures.

Automobile search—Vehicle Identification Number.—Fourth Amendment was not violated where, after respondent was stopped for committing traffic violations, (1) a city police officer opened car's door to move papers obscuring dashboard area where Vehicle Identification Number was located, and observed a gun's handle protruding from underneath driver's seat, (2) gun was then seized and respondent was arrested, and (3) respondent was later convicted of criminal possession of a weapon; New York Court of Appeals' decision to contrary did not rest on an adequate and independent state ground so as to deprive this Court of jurisdiction. New York v. Class, p. 106.

XI. Taking of Property.

Multiemployer pension plan—Employer's liability on withdrawal.—Provisions of multiemployer Pension Plan Amendments Act of 1980 requiring an employer withdrawing from a multiemployer pension plan to pay a fixed and certain debt to plan amounting to employer's proportionate share of plan's "unfunded vested benefits" do not violate Taking Clause of Fifth Amendment. Connolly v. Pension Benefit Guaranty Corp., p. 211.

CONVENTION ON THE TERRITORIAL SEA AND CONTIGUOUS ZONE. See **Federal-State Relations.**

COUNTIES' LIABILITY FOR ACTS OF DEPUTY SHERIFFS. See **Civil Rights Act of 1871, 1.**

COURTS OF APPEALS. See **Jurisdiction.**

CRIMINAL LAW. See also **Civil Rights Act of 1871, 2, 3; Constitutional Law, I–III; IV, 1; VII, 3; VIII–X; Stays.**

CRIMINAL LAW—Continued.

Indictments—Grand jury proceedings—Presence of witnesses.—Where (1) a federal grand jury returned an indictment charging defendants with criminal offenses but later returned a superseding indictment expanding one charge, (2) two law enforcement agents testified in tandem before grand jury in support of superseding indictment, (3) defendants did not learn about this until after their jury trial began, and (4) defendants were convicted, petit jury's guilty verdict rendered harmless any error in grand jury's decision that might have flowed from alleged violation of Federal Rule of Criminal Procedure 6(d) in allowing two agents' simultaneous presence before grand jury. United States v. Mechanik, p. 66.

CRUEL AND UNUSUAL PUNISHMENT. See Constitutional Law, II; Stays.

CUSTODIAL INTERROGATION. See Constitutional Law, VIII, 1, 3.

DEATH PENALTY. See Stays.

DEFAMATION ACTIONS. See Constitutional Law, VII, 2.

DISQUALIFICATION OF JUDGES. See Constitutional Law, IV, 2.

DOUBLE JEOPARDY. See Constitutional Law, III.

DUE PROCESS. See Constitutional Law, II; IV; VIII, 3.

DUES OF LABOR UNIONS. See Constitutional Law, V.

EARNED-INCOME CREDITS. See Internal Revenue Code, 1.

EIGHTH AMENDMENT. See Constitutional Law, II; Stays.

ELECTION FOR AFFILIATION OF LOCAL UNION WITH INTERNATIONAL UNION. See National Labor Relations Act, 1.

EMPLOYEE RETIREMENT INCOME SECURITY ACT. See Constitutional Law, XI.

EMPLOYER AND EMPLOYEES. See Arbitration; Constitutional Law, XI; Fair Labor Standards Act; National Labor Relations Act.

EQUAL PROTECTION OF THE LAWS. See Statutes of Limitations.

EVIDENCE. See Constitutional Law, I; VIII, 1.

EXCISE TAXES. See Comprehensive Environmental Response, Compensation, and Liability Act of 1980.

FAIR LABOR STANDARDS ACT.

Overtime benefits—Exclusion of seamen—Employees on fish-processing barge.—Where (1) respondent employees, members of engineering department on petitioner's fish-processing barge, filed suit to recover overtime benefits under Act, (2) District Court held that respondents were excluded

FAIR LABOR STANDARDS ACT—Continued.

from such benefits under Act's exclusion of seamen, and (3) Court of Appeals reversed on basis of its finding, under a *de novo* standard of review, that respondents were not seamen, Court of Appeals erred in engaging in such factfinding and should have instead applied "clearly erroneous" standard under Federal Rule of Civil Procedure 52(a). Icicle Seafoods, Inc. v. Worthington, p. 709.

FEDERAL INCOME TAXES. See **Internal Revenue Code.**

FEDERAL RULES OF APPELLATE PROCEDURE.

Amendments to Rules, p. 1153.

FEDERAL RULES OF CIVIL PROCEDURE. See **Fair Labor Standards Act; Patents.**

FEDERAL RULES OF CRIMINAL PROCEDURE. See **Criminal Law.**

FEDERAL-STATE RELATIONS. See also **National Labor Relations Act,** 3.

Title to seabed—Nantucket Sound.—In proceedings to determine whether title to seabed along Atlantic coast belongs to certain States or United States, Special Master properly concluded that Nantucket Sound was not a part of Massachusett's inland waters under "ancient title" doctrine so as to constitute a "historic bay" belonging to Massachusetts. United States v. Maine, p. 89.

FIFTH AMENDMENT. See **Constitutional Law,** III; VIII, 1, 3; XI.

FIRST AMENDMENT. See **Constitutional Law,** V–VII; **Jurisdiction.**

FISH-PROCESSING BARGE EMPLOYEES. See **Fair Labor Standards Act.**

FLOOD CONTROL ACT OF 1944.

Hydroelectric power—Government's sales to cities—Interim rates.—Neither Act's provisions authorizing Secretary of Energy to fix rates for sale of hydroelectric power generated at federal dams, nor power purchase contracts between Government and respondent cities, precluded Secretary from making hydroelectric power rates effective on an interim basis, even though further administrative review of rates was still pending. United States v. Fulton, p. 657.

FOURTEENTH AMENDMENT. See **Civil Rights Act of 1871,** 1, 3; **Constitutional Law,** II; IV; VIII, 3; IX; **Statutes of Limitations.**

FOURTH AMENDMENT. See **Civil Rights Act of 1871,** 1, 3; **Constitutional Law,** X.

FREEDOM OF ASSOCIATION. See **Constitutional Law,** V.

FREEDOM OF RELIGION. See Constitutional Law, VI; Jurisdiction.

FREEDOM OF SPEECH. See Constitutional Law, V; VII.

GRAND JURY PROCEEDINGS. See Criminal Law.

GUILTY VERDICTS. See Criminal Law.

HANDICAPPED CHILDREN. See Civil Rights Attorney's Fees Awards Act of 1976.

HARMLESS-ERROR DOCTRINE. See Constitutional Law, I, 2.

HAZARDOUS SUBSTANCES. See Comprehensive Environmental Response, Compensation, and Liability Act of 1980.

HEADGEAR OF MILITARY PERSONNEL. See Constitutional Law, VI.

HEARSAY. See Constitutional Law, I, 1.

"HISTORIC BAY." See Federal-State Relations.

HYDROELECTRIC POWER. See Flood Control Act of 1944.

ILLEGITIMATE CHILDREN. See Statutes of Limitations.

IMMUNITY OF POLICE OFFICER FROM DAMAGES LIABILITY. See Civil Rights Act of 1871, 3.

IMPEACHMENT OF WITNESSES. See Constitutional Law, I, 2.

INCOME TAXES. See Internal Revenue Code.

INDICTMENTS. See Criminal Law.

INSTRUCTIONS TO JURY. See Stays.

INSURER'S LIABILITY FOR FAILURE TO PAY CLAIMS. See Constitutional Law, IV, 2.

INTERIM RATES FOR SALES OF FEDERAL HYDROELECTRIC POWER. See Flood Control Act of 1944.

INTERNAL REVENUE CODE.

1. *Excess earned-income credit—Interception of refund by Secretary of Treasury.*—Under provisions of Code and of Social Security Act directing Secretary of Treasury to intercept certain income tax refunds payable to persons who have failed to meet child-support obligations, and authorizing Secretary to pay such refunds to State to which unpaid support payments were assigned under Aid to Families with Dependent Children program, an excess earned-income credit can properly be intercepted by Secretary. Sorenson v. Secretary of Treasury, p. 851.

2. *Medical journal—Advertisements—Income tax.*—Respondent tax-exempt organization that published a monthly medical journal containing

INTERNAL REVENUE CODE—Continued.

articles relevant to practice of internal medicine was liable—under § 511(a)(1) of Code, which imposes a tax on "unrelated business taxable income" of tax-exempt organizations—for tax on profits it earned from paid advertisements in journal for pharmaceuticals and for medical supplies and equipment useful in practice of internal medicine. United States v. American College of Physicians, p. 834.

INTERROGATION BY POLICE. See **Constitutional Law, VIII, 1, 3.**

JAPANESE FIRMS' PRICE-FIXING CONSPIRACY FOR TELEVISION SETS. See **Antitrust Acts, 1.**

JUDGE'S DISQUALIFICATION FOR BIAS. See **Constitutional Law, IV, 2.**

JUDGE'S IMPOSITION OF SENTENCE AFTER RETRIAL. See **Constitutional Law, IV, 1.**

JURISDICTION. See also **Constitutional Law, X.**

Student religious club—Suit against School District and School Board members—Board member's standing to appeal.—Where (1) high school students' religious club was denied permission to hold meetings on school premises during student activity periods, (2) students filed suit against School District, members of School Board, and other school officials, alleging a violation of students' First Amendment religious rights, (3) Federal District Court ruled in students' favor but entered no injunction and granted no relief against any defendant in his individual capacity, and (4) School District did not appeal but respondent Board member did, Court of Appeals had no jurisdiction since respondent had no standing to appeal in either his individual capacity, his official capacity, or his capacity as a parent of a student attending high school. Bender v. Williamsport Area School Dist., p. 534.

JURY INSTRUCTIONS. See **Stays.**

LABOR UNIONS. See **Arbitration; Constitutional Law, V; National Labor Relations Act, 1.**

LANDLORD AND TENANT. See **Antitrust Acts, 2.**

LESSER INCLUDED OFFENSES. See **Constitutional Law, III.**

LIBEL AND SLANDER. See **Constitutional Law, VII, 2.**

LIMITATION OF ACTIONS. See **Statutes of Limitations.**

LOCAL UNION'S AFFILIATION WITH INTERNATIONAL UNION. See **National Labor Relations Act, 1.**

LOCATION OF ADULT MOTION PICTURE THEATERS. See **Constitutional Law, VII, 1.**

MASSACHUSETTS. See **Federal-State Relations.**

MEDICAL JOURNALS. See **Internal Revenue Code, 2.**

MENTALLY HANDICAPPED CHILDREN. See **Civil Rights Attorney's Fees Awards Act of 1976.**

MILITARY UNIFORMS. See **Constitutional Law, VI.**

***MIRANDA* WARNINGS.** See **Constitutional Law, VIII, 1, 3.**

MOTION PICTURE THEATERS. See **Constitutional Law, VII, 1.**

MOTOR VEHICLE SEARCHES. See **Constitutional Law, X.**

MOVIES. See **Constitutional Law, VII, 3.**

MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF 1980. See **Constitutional Law, XI.**

NATIONAL LABOR RELATIONS ACT.

1. *Local union's affiliation with international union—Election—Participation of nonunion employees.*—National Labor Relations Board exceeded its authority under Act in requiring that nonunion employees in a bargaining unit represented by a local union be allowed to vote in union's election for affiliation with an international union before it would order employer to bargain with affiliated union. NLRB v. Financial Institution Employees, p. 192.

2. *Taxicab franchise renewal—City's conditioning on settlement of labor dispute—Pre-emption.*—Respondent city's conditioning renewal of petitioner's taxicab franchise on settlement of a labor dispute between petitioner and its striking drivers by a certain date was pre-empted by Act. Golden State Transit Corp. v. Los Angeles, p. 608.

3. *Violations of Act—Debarment from doing business with State.*—Act pre-empts a Wisconsin statute that debarred, for three years, persons or firms who had violated federal Act three times within a 5-year period from doing business with State. Wisconsin Dept. of Industry v. Gould Inc., p. 282.

NATIONAL LABOR RELATIONS BOARD. See **National Labor Relations Act, 1.**

NEW JERSEY. See **Comprehensive Environmental Response, Compensation, and Liability Act of 1980.**

NEWSLETTERS OF PUBLIC UTILITIES. See **Constitutional Law, VII, 4.**

OBSCENE MOVIES. See **Constitutional Law, VII, 3.**

OBVIOUSNESS OF PATENTS. See **Patents.**

OVERTIME BENEFITS. See **Fair Labor Standards Act.**

PARENT AND CHILD. See Internal Revenue Code, 1; Statutes of Limitations.

PATENTS.

Infringement—Obviousness of patents—Review of District Court findings.—Where (1) respondent sued petitioner for infringement of respondent's patents for plastic cable ties, (2) District Court held that patents were invalid for obviousness, and (3) Court of Appeals reversed, District Court's subsidiary determinations, at least, were subject to Federal Rule of Civil Procedure 52(a)'s "clearly erroneous" review standard, regardless of whether ultimate question of obviousness was one of fact; Court of Appeals' judgment was reversed, and case was remanded for further consideration in light of Rule, which was not mentioned by Court of Appeals in reversing District Court's judgment. Dennison Mfg. Co. v. Panduit Corp., p. 809.

PATERNITY ACTIONS. See Statutes of Limitations.

PENNSYLVANIA. See Statutes of Limitations.

PENSION PLANS. See Constitutional Law, XI.

PERJURY. See Constitutional Law, VIII, 2.

PLASTIC CABLE TIES. See Patents.

POLICE INTERROGATION. See Constitutional Law, VIII, 1, 3.

POLICE OFFICER'S IMMUNITY FROM DAMAGES LIABILITY. See Civil Rights Act of 1871, 3.

POLICE OFFICIALS' LIABILITY FOR UNLAWFUL ARRESTS. See Civil Rights Act of 1871, 2.

POLLUTION. See Comprehensive Environmental Response, Compensation, and Liability Act of 1980.

PRE-EMPTION OF STATE OR LOCAL LAW BY FEDERAL LAW. See Antitrust Acts, 2; Comprehensive Environmental Response, Compensation, and Liability Act of 1980; National Labor Relations Act, 2, 3.

PRESENCE OF WITNESSES BEFORE GRAND JURY. See Criminal Law.

PRICE-FIXING CONSPIRACY BY JAPANESE TELEVISION SET MANUFACTURERS. See Antitrust Acts, 1.

PRISONS AND PRISONERS. See Constitutional Law, II.

PRIVILEGE AGAINST SELF-INCRIMINATION. See Constitutional Law, VIII, 3.

PROBABLE CAUSE FOR SEARCH WARRANTS. See Constitutional Law, VII, 3.

PROFESSIONAL JOURNALS. See Internal Revenue Code, 2.

PUBLIC UTILITY'S ENCLOSURE OF NEWSLETTER IN BILLING ENVELOPES. See Constitutional Law, VII, 4.

RATES FOR SALES OF FEDERAL HYDROELECTRIC POWER. See Flood Control Act of 1944.

RECUSAL OF JUDGES. See Constitutional Law, IV, 2.

RELIGIOUS FREEDOM. See Constitutional Law, VI; Jurisdiction.

REMEDY FOR DOUBLE JEOPARDY VIOLATION. See Constitutional Law, III.

RENEWAL OF TAXICAB FRANCHISES. See National Labor Relations Act, 2.

RENT CEILINGS. See Antitrust Acts, 2.

RETIREMENT PENSION PLANS. See Constitutional Law, XI.

RIGHT TO COUNSEL. See Constitutional Law, VIII.

RIGHT TO FAIR TRIAL. See Constitutional Law, IX.

RIGHT TO REMAIN SILENT. See Constitutional Law, VIII, 3.

RIOTS IN PRISONS. See Constitutional Law, II.

ROBINSON-PATMAN ACT. See Antitrust Acts, 1.

SCHOOL'S DENIAL OF MEETING PLACE FOR STUDENT RELIGIOUS CLUB. See Jurisdiction.

SEABED. See Federal-State Relations.

SEAMEN. See Fair Labor Standards Act.

SEARCHES AND SEIZURES. See Civil Rights Act of 1871, 1, 3; Constitutional Law, VII, 3; X.

SELF-INCRIMINATION. See Constitutional Law, VIII, 3.

SENTENCING AFTER RETRIAL. See Constitutional Law, IV, 1.

SETTLEMENT OF CLASS ACTIONS. See Civil Rights Attorney's Fees Awards Act of 1976.

SHERMAN ACT. See Antitrust Acts.

SIXTH AMENDMENT. See Constitutional Law, I; VIII; IX.

SOCIAL SECURITY ACT. See Internal Revenue Code, 1.

STANDING TO APPEAL. See Jurisdiction.

STATE EXCISE TAXES. See **Comprehensive Environmental Response, Compensation, and Liability Act of 1980.**

STATUTES OF LIMITATIONS.

Paternity action—Validity of statute—Enactment of new statute.—Where (1) appellant filed a paternity and child support action in a Pennsylvania court in 1980 on behalf of her 7-year-old daughter, born out of wedlock, alleging that appellee was father, (2) court held that action was barred by state statute of limitations requiring that such actions be brought within six years of child's birth or within two years of putative father's last voluntary support payment, (3) appellant's claim that statute violated Equal Protection Clause was rejected, and (4) Superior Court affirmed, judgment was vacated, and case was remanded for further consideration in light of State's intervening enactment of a new statute providing that a paternity action could be commenced within 18 years of child's birth. Paulussen v. Herion, p. 557.

STAYS.

Judgment invalidating death penalty.—California's application to stay enforcement of State Supreme Court's judgment invalidating respondent's death sentence for first-degree murder on ground that Eighth Amendment was violated by an instruction given at sentencing phase of trial that told jury not to be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling," is granted. California v. Brown (REHNQUIST, J., in chambers), p. 1301.

STUDENT RELIGIOUS CLUBS. See **Jurisdiction.**

SUPREME COURT. See also **Constitutional Law, X.**

Amendments to Federal Rules of Appellate Procedure, p. 1153.

"TAKING" OF PRIVATE PROPERTY. See **Constitutional Law, XI.**

TAXES. See **Comprehensive Environmental Response, Compensation, and Liability Act of 1980; Internal Revenue Code.**

TAXICAB FRANCHISES. See **National Labor Relations Act, 2.**

TELEVISION SET MANUFACTURERS' PRICE FIXING. See **Antitrust Acts, 1.**

UNIFORMED TROOPERS' PRESENCE IN COURTROOM. See **Constitutional Law, IX.**

UNIFORMS OF MILITARY PERSONNEL. See **Constitutional Law, VI.**

UNIONS. See **Arbitration; Constitutional Law, V; National Labor Relations Act, 1.**

UNITED STATES' SALES OF HYDROELECTRIC POWER TO CITIES. See Flood Control Act of 1944.

VEHICLE IDENTIFICATION NUMBER. See Constitutional Law, X.

VEHICLE SEARCHES. See Constitutional Law, X.

VIDEOCASSETTE RENTALS. See Constitutional Law, VII, 3.

VINDICTIVENESS OF JUDGE IN IMPOSING SENTENCE AFTER RETRIAL. See Constitutional Law, IV, 1.

WAGES AND HOURS. See Fair Labor Standards Act.

WAIVER OF ATTORNEY'S FEES. See Civil Rights Attorney's Fees Awards Act of 1976.

WAIVER OF CONSTITUTIONAL RIGHTS. See Constitutional Law, VIII, 1, 3.

WARRANTS TO SEIZE OBSCENE MOVIES. See Constitutional Law, VII, 3.

WATERS. See Federal-State Relations.

WILSON TARIFF ACT. See Antitrust Acts, 1.

WISCONSIN. See National Labor Relations Act, 3.

WITHDRAWAL BY EMPLOYER FROM MULTIEMPLOYER PENSION PLAN. See Constitutional Law, XI.

WITNESSES. See Constitutional Law, I; Criminal Law.

WITNESSES' PRESENCE BEFORE GRAND JURY. See Criminal Law.

WORDS AND PHRASES.

1. "*Any employee employed as a seaman.*" Fair Labor Standards Act, 29 U. S. C. § 213(b)(6). Icicle Seafoods, Inc. v. Worthington, p. 709.

2. "*Unrelated business taxable income.*" Internal Revenue Code, 26 U. S. C. § 511(a)(1). United States v. American College of Physicians, p. 834.

ZONING. See Constitutional Law, VII, 1.